

4 6283 46.5

A N

Historical Treatise

O F

An ACTION or SUIT at Law;

AND OF THE

Proceedings used in the *King's Bench* and *Common Pleas*, from the *Original Processes* to the *Judgments* in both Courts; wherein the *Reason* and *Usage* of the *old, obscure* and *formal* Parts of our *Writs* and *Pleadings*, such especially as have Reference, or relate to the *ancient* Method of *Practice*, as well before the Statute of *Nisi prius* as after-wards, are duly considered, in order to shew from whence they arose.

ALSO

An Account of the *Alterations* that have been made from Time to Time for regulating the Course of Practice in the several Courts.

WITH

Such *Remarks* and *Observations*, as tend to explain and illustrate the present Mode of Practice;

AND

Pointing out such Particulars as would *contract* the *Proceedings*, and render them more *concise*, *plain* and *significant*, and *less expensive* to the *Suitors*.

Nescire quid antequam natus sis acciderit, id est semper esse puerum.
CIC.

By R. BOOTE.

The SECOND EDITION, with ADDITIONS.

L O N D O N :

Printed by his MAJESTY'S LAW-PRINTERS;
For W. OWEN, between the *Temple-Gates*, *Fleet-street*;
MDCCLXXXI.

C.

T

I
for
on
em
cu
inc
too
bar
dif
to
mo
cei
the
wa
wit
lap
for
I
the
a r
cine
dri

The CASE of JOHN WOODHOUSE,
Esq; of *Bridewell Hospital*, one of the
Directors of the *East-India* Company.

IN the Autumn of 1775, he was seized with a violent cold, or influenza, which continued some months, then fell on the bowels and brought on a constant purging. He took the advice of eminent physicians, and found relief, but not a cure. In the spring following, as the complaint increased, he went to Bath, drank the waters, took such medicines as were judged proper, and bathed three or four times; by which means the disorder seemed somewhat abated;—in July went to the German Spa, where he continued three months, during six weeks of which time he received benefit from the Geronsteer water, but then the disorder changed to a dysentery; which was removed by medical assistance. He went on with the waters, and was rather better; but relapsed in the winter, and continued equally bad for seven or eight months.

In June 1777 he returned to Spa, and drank the Savaniere waters, which had a good effect for a month, then grew worse, tried former medicines to no purpose, and was obliged to leave off drinking the waters; but bathed in the mineral
bath

bath of Tonolet made warm; and in the natural hot baths of Chaude Fontaine, without any benefit: the dysentery daily increasing, with much pain he returned to England, quite emaciated and feeble.

In September, upon the encouragement given him by a worthy gentleman in the neighbourhood of Nevil-Holt, Leicestershire, (a Member of Parliament) and by the advice of Dr. Garrow, of Barnet, he went to try the waters of Nevil-Holt, first in small quantities, as an alterative, increasing the dose gradually, from a pint to three or four: they acted as a purgative, in a greater or less degree, according to the number of glasses drank, and more than answered his most sanguine expectations: for though no other opening medicine could be taken without manifest prejudice, the briskest operation by these waters did not in the least degree relax or weaken, but braced and strengthened him. In six weeks the dysentery was cured, and the purging greatly abated, and continued so during the winter in London, where he drank that water pretty constantly. In 1778 he spent two months at Nevil-Holt, drinking the water at the fountain head, got perfectly cured, and returned home in good health, and has recovered his flesh, strength, and spirits, and so continues, 1780.

The NEVIL-HOLT WATER is sold by W. OWEN, at the ORIGINAL MINERAL WATER WAREHOUSE in LONDON, No, 11, near Temple-bar, Fleet-street, (established in its reputation above fifty years, by the recommendation of the most eminent Physicians) where the Gentlemen of the Faculty, and the Public, may depend

depend on being faithfully served with all the mineral waters, in the greatest perfection, viz.

The genuine SELTZER WATER, immediately from the fountain head, filled under the inspection of the Comptroller to his Highness the ELECTOR of TREVES:—The genuine GERMAN SPA Water, from the Pouhon spring, in large and small flasks; and the genuine PYRMONT Water, in three-pint bottles.

BRISTOL Water, SCARBOROUGH Water certified by the Magistrates of Scarborough, NEVIL-HOLT, HARROGATE, TILBURY, MALVERN, JESSOP:—Bath Water, certified by the pumper, and CHELTENHAM Water, arrive constantly fresh every week as usual.—Also Tar Water.—Sea Water in it's utmost purity, taken up several leagues at sea.—Cheltenham and Scarborough Salts.

W. OWEN presumes to assure the Gentlemen of the Faculty, and the Public, that the mineral Waters, sold at his Warehouse, are filled in the most proper seasons only, when they are in perfection. And as he has spared no pains nor expence to have the genuine waters of Seltzer, Pouhon Spa, and Pyrmont, secured in the best manner, so as effectually to preserve their mineral spirit, and medicinal virtues, he has reason to flatter himself that the Waters he imports are not inferior to those at the fountain head.

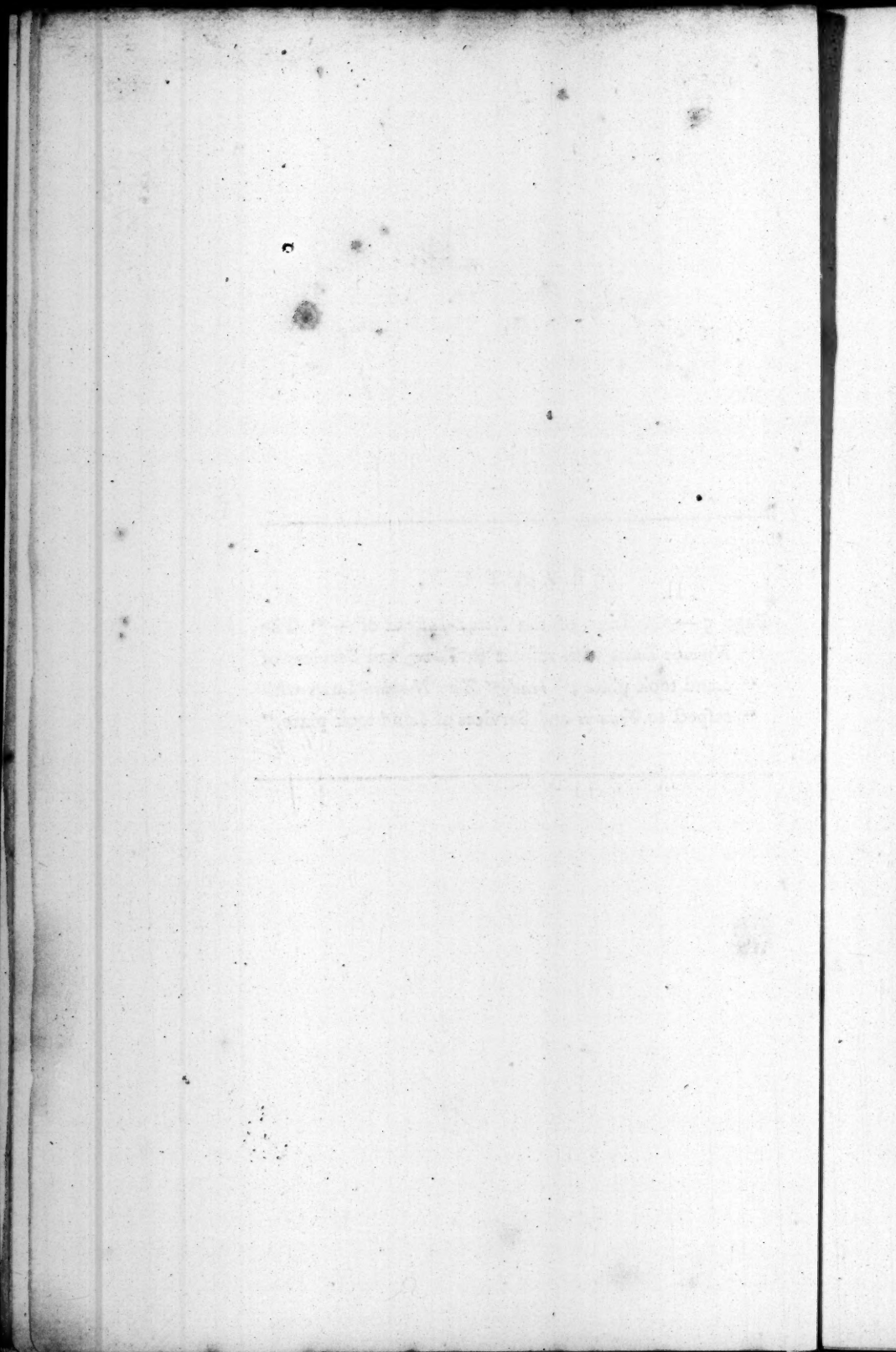
* * Great quantities of spurious waters having been notoriously substituted in the room of the genuine, to the disappointment of the Physicians, and their Patients, as fully appears by a certificate in my possession; in order to prevent impositions so dangerous to health, as much as
lies

lies in my power, I have found it necessary to seal with my name, every bottle of SELTZER water, and of PYRMONT, and SPA water imported by me; of which those who favour me with their commands will please to take notice : And, for the same reason, I beg leave to request they will give orders to have a bill and receipt signed by their most obedient servant,

W. OWEN.

ERRATUM.

Page 5 — 6th Line of the *Note*: Instead of — “ The
“ *Norman* Laws with respect to *Terms* and Services of
“ Land took place ;” read “ The *Norman* Laws with
“ respect to *Tenures* and Services of Land took place.”



T H E
P R E F A C E.

THE *Obscurity* and *Expence* which necessarily attend the conducting of a *Suit at Law*, especially where *Special Pleadings* are requisite to be made, have long been the Subject of Complaint, not only to *Clients* who sensibly feel these Inconveniences, but likewise to every conscientious Practitioner of the Law.

The Courts at *Westminster* have long been sensible of this Grievance; and nothing perhaps could be more agreeable to the *Sages* of the Law, as well as to *Clients* themselves, than to point out some Method by which the Proceedings in a Suit may be contracted or reduced into Forms more concise, and consequently less intricate and less expensive than they are at present.

To effect so desirable an End, nothing will be more conducive than the disbur-

A 2

thening

thening the Pleadings in a Suit of that great Number of dark and obscure References to *ancient* Customs and Things, with which (though they are now become obsolete, and apparently unnecessary) the Proceedings at Law still continue to be enveloped, obscured, and rendered unnecessarily expensive.

The following *Historical Treatise of a Suit at Law*, is intended, not only to *illustrate* and *explain* such *formal* Parts of our Writs and Pleadings, but to point out such Parts of them as, having no other Foundation than in *ancient* Use and Customs, it is apprehended may be very well spared, and the remaining Part of the Pleadings thereby not only rendered more clear, significant and intelligible, but at the same Time less grievous to the Client.

How far the Detail I have engaged in, may be found sufficient to answer the End I had in View must be left to the Reader's Judgment to determine. But, if from the Reflections and Observations which are suggested in the Course of this Work, there is Matter sufficient pointed out, to shew the Reasonableness and Expediency of such a Reformation in the present Mode of Law Proceedings, it is hoped some Gentleman who may be more equal to the Task, will improve upon the Hints I have
given

P R E F A C E.

v

given, and more effectually point out the Manner in which such a Reformation, or Amendment, may be brought about; and that those who alone have it in their Power, will one Day put a finishing Hand to a Work so extremely necessary and so much wished for. Till something of this Sort be done, we must still puzzle on in the obscure and dark Tracts of Antiquity, in which the young Practitioners often lose their Way, to the manifest Delay of Justice, and to the no small Expence of the Client.

King *James* the First was so sensible of the great Burthen and Inconveniences of the superfluous Branches in Law Proceedings in his Time, that in a Speech in the *Star-Chamber* in 1614 (as I have read in an old Tract of *J. Cooke's*) he promised to cut them all off, though in Reality we do not find any great Matter was done towards it in his Time. And in the troublesome Reign of his unhappy Son King *Charles* the First (the Martyr to the Laws and Religion of his Kingdom) there was no Time for Reflection on Matters of this Sort; but in the Reign of King *Charles* the second, the Grievances arising from hence were thought so great, that the *Courts at Westminster*, to their Honour be it remembered, took the Matter into their Consideration;

P R E F A C E.

and in order to remove the expensive, unnecessary, and vexatious Methods of Practice then in Use, they made a Rule to regulate the Law Proceedings, by which, as well as by several Acts of Parliament and subsequent Rules, many luxuriant Branches of this overspreading Vine have from Time to Time been lopp'd off.

But in doing this it is evident that many Intricacies and contradictory Methods (with respect to the old Grounds of Practice, as will be shewn) were introduced, and many Things which might have been spared were suffered to remain; Things which at present render the Proceedings in a Suit not only contradictory, but altogether dark and mysterious, and unintelligible, even, as it is imagined, to one half of the Practitioners themselves; few of them diving to the Bottom for the Reason and Meaning of their Use, but contenting themselves with a superficial Knowledge only, just as they find them directed to be used in the Books of Practice.

It is well known that there were formerly various Kinds of Actions made use of upon different Occasions, especially in the Court of *Common Pleas*; and the *Original Writs* employed in such Actions were as various as the several *Causes* of Actions
upon

upon which they were grounded. Hence we meet with Actions of *Affize*, Actions upon the several Writs of Formedon in *Descender*, in *Remainder*, and in the *Reverter*, &c. all which are now laid aside, and supplied by others, *viz.* by *Ejectments*, &c.

Again, the suing out *Special Originals* in the Court of *Common Pleas*, and filing *Bills* in the *King's Bench*, were always the necessary Introductions to a Suit; and tho' these are much laid aside too, (for generally speaking they are not used in *one* Action in an *hundred*, and when they are, it is more to enhance the Expence and hurt the Parties, than for any real Use or Necessity there is, or need be, for them) yet we continue in our Writs and Pleadings many formal Matters which have Reference to them, and which (as they are mere Formalities, are really unnecessary, and tend only to render the Proceedings more intricate and expensive) might very well be spared. The same also may be said with regard to many other Things now used in a Suit.

When one considers the great Number of Amendments that have from Time to Time been made in Point of Practice, in order to prevent the vexatious Behaviour

P R E F A C E.

of Suitors towards one another, one would imagine no Grievance of this Kind could remain; and yet is not many a poor Man at the first Instance saddled with a Bill of Costs of 7 or 8 *l.* (and frequently more) for *drawing, ingrossing* and *filing a Special Original, &c.* and this for a Debt perhaps of *ten or twelve Pounds* only, when the Plaintiff had as speedy a Remedy, and as beneficial a one by a *Latitat* or *Capias* for the small Expence of 1 *l.* 14 *s.* 6 *d.* including 10 *s.* 6 *d.* for the Arrest? It is amazing that any Man can reconcile this to his own Conscience, merely by saying it is the allowed Method of Practice; nevertheless Instances of this Kind frequently occur, which in my Opinion do not a little contribute to the Disgrace of the Profession.

The Abuse that was made of the *Bill of Middlesex* before the 13th of King *Charles* the Second was scarcely greater than that now hinted at. Then indeed it was in the Power of any one Man, at a small Expence, to hurt the Credit of many, by arresting them by this Writ, for large Sums, and, by not declaring, suffer the Action to drop without paying any Costs. Here, however, if the Defendant could give Bail to the Sheriff, he frequently got rid of the Suit; but the Pretence for suing out a

Special Original is, that the Sheriff shall not take Bail at all, in order thereby to elude those most excellent Laws made in Favour of the Liberty of the Subject, or else to enhance the Attorney's Bill and increase the Costs of Suit, which renders the Difficulty the Defendant lies under, of paying the Debt and Costs, still the greater.

It will be needless to mention here any further Instances of the Abuse made, or the Inconveniences arising from the present Modes of Proceeding, as many more will be pointed out in the ensuing *Treatise*, in which the present Practice will be shewn, as it is conceived, to be either superabundantly formal and methodical, or else defective even to a Fault.

From what has been said, it is apprehended that it will sufficiently appear to the Reader, that by omitting or lopping off many merely formal and fictitious Matters now used in a Suit, and thereby reducing our Writs and Pleadings to more concise, plain and significant Forms, it will be no difficult Matter to set aside in a great Measure, if not altogether, the Objections that are made to the ordinary Proceedings in Suits at Law, and to render the Whole more intelligible and less expensive.

That

That some of our Formalities are become ridiculous to every sensible Person, I believe will be granted; as also, that many are useless and unnecessary. Let me then ask this Question, whether it be most prudent to continue such Things, which are an Oppression and Burthen upon the Subject, in Reference to old Laws and Customs, or to reform and ease them by new?

If it should be objected, that a Reformation of this Kind may prove hurtful to the Practice in general, I can only answer that I am inclined to think the contrary. As Things are at present circumstanced, many People would sooner be contented to lose their Right, than encounter with the *Difficulties* of the Law; for where is the Encouragement to a Suitor, when after having been at a considerable Expence in order to obtain Justice against some litigious Adversary, perhaps for the Omission of some mere Matter of Form he shall become intangled in a *Demurrer*, or shall be obliged to drop his Suit, and pay Costs, or go through the whole Proceedings afresh? Or, supposing he sues for a just Debt, he shall be obliged to expend twice as much as the Debt he sues for amounts to, before he shall be able to obtain a *Judgment* or *Verdict*; and after
 I he

he has succeeded thus far, he is certain of being Money out of Pocket to carry that *Judgment* into Execution.

From such Considerations as these, People are often deterred from having Recourse to the Law in order to recover what is ever so unjustly with-held from them. And hence it is that Attornies, like Physicians and Surgeons, are seldom applied to but through mere Necessity, and then, not without the most terrible Apprehensions for the Costs of Suit.

And indeed there is but too much Reason for this; for the Law is so loaded with Stamp Duties and Office Fees, that these, together with Counsel's Fees, are sufficient to deter Men from seeking for Remedies at all. In the mean Time the Attorney lies under no small Difficulty to satisfy his Client, that these Fees make up the Bulk of his Bill. Certain it is, that when these Fees come to be deducted, there are but few Mechanics who would be contented with so little Profit for their Industry, as an Attorney is *allowed* for conducting a Suit at Law.

It is well known that not many Years ago *half a Guinea* was the common Fee to an Opening Counsel, and in common Cases

a *Guinea* to a superior one, or Pleader ; and though it is as well known now that there is not a Gentleman at the Bar who will accept of such Fees, yet there is so little Consideration in the *Allowance* of Costs, that for this, in *common Cases*, no more than 1 *l.* 11 *s.* 6 *d.* is *allowed* as the *common* Costs ; the Consequence is, that the *extra* Costs must be paid by the Client, which, with Execution Fees, (in all Cases for small Debts of 4 or 5 *l.*) make the Remedy worse than the Disease. Is this reasonable ? or is it an Encouragement to Men to become Suitors to the Courts of Law for Justice ? This is mentioned as a Hint to shew the Necessity of a more equitable Manner of *taxing* Costs, and not as any Reflection upon the Gentlemen at the Bar.

And here I cannot but observe, that whilst an Increase of Customs on Goods and Merchandise affords the Merchant and Mechanic an Opportunity of enhancing the Prices of their respective Commodities, no additional Weight of Taxes, no extraordinary Dearness of Provisions, or any other of the Necessaries of Life, work any Change with respect to the Attornies ; but what was their Fee three hundred Years ago, remains the same to this Day. Is not this a Hardship upon them ?

But

But to return. What adds to the Mischief arising from the present Intricacy of Law Proceedings, as it respects the Practitioners of the Law, is, that Clients, terrified by the great Costs which necessarily attend the Prosecution of a Suit in the Courts at *Westminster*, are driven into an inferior Court within the Confines of this Metropolis, which greatly substracts from the Business in the Courts at *Westminster*.

In this Court, just alluded to, poor Men are arrested for *forty Shillings* *; a shocking Inducement for having Recourse to it! And there too upon the *Service* of a *Process* they are presently run up to an *Execution*, and imprisoned for very trifling Sums, with as much Severity as for ever such great ones in the Courts above.

It were therefore to be wished for the Sake of the Poor, that Courts of Conscience were established to take Place of it, and that Matters of greater Concern were confined to the Courts at *Westminster* only. Though with regard to such Causes as are not cognizable by a Court of Con-

* Since the publishing the first Edition of this Treatise, an Act hath passed, whereby this Court alluded to, and all inferior Courts are restrained from holding a Defendant to bail for any Sum under 10*l*.

science,

science, while the present Intricacy and enormous Expence attending the Proceedings in a Suit in the Courts at *Westminster*, continue, such an Alteration can hardly be hoped for; for, unless a Law be enacted for the Purpose, Clients will have Recourse to that Court, where their Suits are likely to be soonest ended, and at the least Expence.

But were the Reformation, so much wished for, once established; were our Pleadings and Mode of Practice reduced to a more plain, less intricate, and less expensive Method, the Difficulties and Hardships upon both Attornies and Clients would vanish; and instead of such Alterations proving hurtful to the Profession in general, the Obloquies it at present labours under would be removed, Clients would find it their Interest to apply to the Courts above rather than to an inferior Court, and the Business at *Westminster* would not fail of receiving a considerable Increase by it.

'Till this desirable Event is brought about, the following *short Treatise* may at least serve to facilitate the Study of the practic Part of the Law, by giving the younger Practitioners an Insight into so much of the *ancient* Forms and Methods
of

of Practice, as may tend to illustrate and explain such formal Parts as are still retained in our Writs and Pleadings, and are the Means of rendering them obscure, and to many unintelligible.

Having given the Reader a sufficient Insight into the Nature and Design of the following Work, it remains to take Notice of one Objection, which perhaps may be made to the Manner in which it is executed.

It may, very probably, be objected, that too many *common* and *familiar Forms*, which are to be met with in Books already extant, are here introduced; but the Reader is desired to consider, that these *Forms* were introduced either the better to explain what related to them, or in order to shew the Difference therein between the two Courts, and were absolutely necessary for that Purpose; such, however, may be easily passed over.

For the Rest, I am not unconscious of many Faults, which may be found in the Course of the ensuing Pages; I have not Vanity enough to think the Performance is so compleat, or so well executed as the Subject deserves. If however what I have done should induce some abler Pen to correct

rect its Errors, and more fully point out the *Reason* and *Grounds* of our *Writs* and *Pleadings*, and expatiate more largely on the Means of establishing the Reformation aimed at, I shall think my Time and Labour not ill bestowed; and that I may deserve and hope for that Candour, which may be necessary to excuse the Inaccuracies of this Performance.

R. B.

A N

T H E
C O N T E N T S.

THE Introduction touching the Original of the <i>King's Bench</i> and <i>Common Pleas</i> ,	Page 1
The <i>King's Bench</i> , the original Court out of which the other was formed,	<i>ib.</i>
The Judge thereof styled <i>Capitalis Angliæ Jus-</i> <i>ticiarius</i> ,	2
The Court of <i>King's Bench</i> called <i>Curia Domini</i> <i>Regis</i>	<i>ib.</i>
— Removeable with the <i>King's</i> Household	<i>ib.</i>
<i>Causes</i> originally held there	<i>ib.</i>
<i>Common Pleas</i> held therein	<i>ib.</i>
<i>County</i> and <i>Hundred Courts</i> originally the <i>Courts</i> for <i>Causes</i> between <i>Subject</i> and <i>Subject</i>	3
<i>Magna Charta</i> made, or rather confirmed by <i>King Henry 3.</i>	4
A <i>Curse</i> denounced against the Violaters of it, see Note	6
<i>Common Pleas</i> sever'd thereby	7
— held at <i>Westminster Hall</i>	8
The Study of the Common Law begun at this Time	<i>ib.</i>
<i>Matters</i> cognizable in the <i>Common Pleas</i>	<i>ib.</i>
The Chief Justice thereof styled <i>Justiciarius de</i> <i>Banco</i>	<i>ib.</i>
a	Writs

C O N T E N T S.

Writs therein returnable <i>coram Just' nostris apud Westmon'</i>	Page 8
Lord Coke's Reasons why <i>Common Pleas</i> might be holden in the <i>King's Bench</i>	9
By what Means the Court of <i>King's Bench</i> soon after <i>Magna Charta</i> began to take Cognizance of <i>Common Pleas</i> , viz. first by <i>Original</i> out of <i>Chancery</i> , secondly by <i>Bill</i>	10
An Action <i>Super Casum</i> , why called so	<i>ib.</i>
A <i>Justicies</i> for Debt, what	11
Marshal of the King's Marshalsea, who	<i>ib.</i>
<i>Ejectments</i> supply <i>Real Actions</i> in both Courts	12

Of an Action.

An Action, why called so	13
The suit till Judgment called an <i>Action</i>	<i>ib.</i>
The <i>Action</i> ends with the Judgment	<i>ib.</i>

Of the commencing an Action in the King's Bench.

By an <i>Original Writ</i> out of the <i>Chancery</i>	<i>ib.</i>
Next by filing a <i>Bill</i> , thereby supposing the Defendant in <i>Custody</i> of the Marshal	<i>ib.</i>
The Direction of the <i>Bill</i>	14
Of the <i>Process</i> thereon	<i>ib.</i>
Why the <i>Process</i> also called a <i>Bill</i>	<i>ib.</i>
It used to be returned and filed before the <i>Latitat</i> issued	15
And the Return recited in the <i>Latitat</i>	<i>ib.</i>
The <i>Latitat</i>	16
Filing the <i>Bill</i> the Ground-work of the Suit	<i>ib.</i>

Of the commencing an Action in the Common Pleas.

By an <i>Original Writ</i> issuing out of the <i>Chancery</i>	17
The	

C O N T E N T S.

xix

The Form of the <i>Original</i> in Case	Page 19
<i>Pledges</i> found thereon	<i>ib.</i>
— why so called	<i>ib.</i>
— taken up from the <i>County</i> and <i>Hundred</i>	
Courts	18
The Use of <i>Pledges</i> , see Note	19
Why the Defendant has no Addition in the	
<i>King's Bench</i> , see Note	20
The Difference attending the Execution of the	
<i>Original</i> in Case, &c.	21
It makes the Variation in the formal Part of	
the Beginnings of the <i>Declaration</i> , see Note <i>ib.</i>	
The Form of the <i>Original</i> in Case, <i>Trespass</i> ,	
and <i>Ejectment</i>	22
The Form of it in <i>Debt</i> , <i>Covenant</i> , <i>Annuity</i> ,	
<i>Account</i> , <i>Detinue</i> , and <i>Replevin</i>	<i>ib.</i>
It's Use was not to <i>arrest</i> the Defendant, but	
to <i>summon</i> him	23
The <i>Return</i> thereof	24
Of the subsequent <i>Processes</i>	<i>ib.</i>
Of the Disuse of <i>Real Pledges</i> , and the new	
Method of Practice thereon by first suing	
out a <i>Capias</i> , without <i>summoning</i> the De-	
fendant	25
Of an <i>Outlawry</i>	<i>ib.</i>
Not used originally in <i>Civil Actions</i>	<i>ib.</i>
But only in <i>Felony</i>	<i>ib.</i>
An <i>Outlaw</i> said to bear <i>Caput Lupinum</i>	<i>ib.</i>
In <i>Bracton's</i> Time used in <i>Actions Vi et Armis</i>	
	26
By Stat. 13 <i>Ed.</i> 1. it lies in <i>Account</i>	<i>ib.</i>
By Stat. <i>Ed.</i> 3. enacted, <i>That no Man but the</i>	
<i>Sheriff</i> put an <i>Outlaw</i> to Death	<i>ib.</i>
By 25 <i>Ed.</i> 3. it lies in <i>Debt</i> , &c.	<i>ib.</i>
By 19 <i>H.</i> 7. in Case, &c.	<i>ib.</i>
Of the <i>Capias</i> , <i>Alias</i> and <i>Pluries</i>	27
a 2	Of

Of the <i>Proclamation</i>	Page 27
How these Writs are now used	<i>ib.</i>
The Court of <i>King's Bench</i> can't proceed to an Outlawry but by an <i>Original</i> Writ out of the <i>Chancery</i>	28
Of the <i>Fine</i> upon <i>Originals</i> , why	29
Taken on <i>Præcipe's quod reddat</i>	<i>ib.</i>
Why not taken in Actions of <i>Trespafs</i>	30
Why Matters of <i>Debt</i> and <i>Trespafs</i> could not be put in the same <i>Action</i>	<i>ib.</i>
When <i>Præcipe's quod reddat</i> begun to be laid aside to avoid the <i>Fine</i>	<i>ib.</i>
Reflections on the Nature of the Beginnings of a Suit in both Courts, as unnecessary	31
<i>Filing Bills</i> against Prisoners, as now used, in no respect consonant to ancient Practice— the Hardship upon them, see Note	32
Suits are now generally ended before they are formally begun according to the ancient Grounds of Practice	34
Of the Form of the <i>Bill</i> or <i>Original</i> in the <i>King's Bench</i>	35
Of the <i>Eill of Middlesex</i> , and it's Use	36
Of the <i>Testatum</i> Bill, or <i>Latitat</i>	37
Of the <i>Ac etiam</i> introduced therein	38
Untruly said to be <i>secundum Consuetudinem Cu- rie nostræ, &c.</i>	<i>ib.</i>
Of the Alteration of the <i>Latitat</i> by it's suppo- sing a <i>Bill of Middlesex</i> to have issued	39
The present Use of the <i>Latitat</i> not consonant to the ancient Use of it	<i>ib.</i>
Of the Abuse made of the <i>Bill of Middlesex</i> before the Statute of 13 <i>Charles 2.</i>	40
Which caused that <i>Statute</i>	<i>ib.</i>
The <i>Statute</i> did not answer it's Design	41
	Not

CONTENTS.

xxi

Not remedied until the 12 of <i>George 1.</i> which requires an <i>Affidavit</i> of the <i>Debt</i> to hold the Defendant to Bail	Page 41
Of the <i>English</i> Notice, when notailable	42
Of these <i>Proceffes</i> as now used	<i>ib.</i>
Of the Difference of the <i>Ac etiam</i> in the <i>Bill of Middlesex</i> and <i>Latitat</i> , see Note	<i>ib.</i>
Of <i>indorsing</i> the Sum on the Back of the Writ	43
Of the Method of procuring the <i>Original</i> out of <i>Chancery</i> by a Note called a <i>Præcipe</i> or <i>Pone</i>	45
The <i>Original</i> on the <i>Præcipe</i>	46
<i>Original</i> on the <i>Pone</i>	48
<i>Præcipe</i> for Things certain	<i>ib.</i>
<i>Pone</i> for Things not certain	<i>ib.</i>
After <i>Originals</i> were returned of course, a <i>Capias quod reddat</i> and the <i>Clausum fregit</i> came to be the leading <i>Proceffes</i>	49
The <i>Forms</i> of these	<i>ib.</i>
Of the <i>Capias</i> by <i>Continuance</i>	50
Of the <i>Testatum Capias</i>	<i>ib.</i>
It's original Use, see Note	<i>ib.</i>
When <i>Præcipe's quod reddat</i> began to be laid aside, and the <i>Capias clausum fregit</i> to be the leading <i>Procefs</i>	52
The Form of it with an <i>Ac etiam</i> according to the 13 <i>Charles 2.</i>	<i>ib.</i>
Without the <i>Ac etiam</i> , and with the <i>English</i> Notice, according to 12 <i>George 1.</i>	53
Of the present Instructions for these Writs to the <i>Filazer</i>	54
How <i>Originals</i> are now made out by the <i>Cursor</i> thereon, &c.	<i>ib.</i>

Of the Defendant's Appearance in the King's Bench.

If the Debt 20 l. Special <i>Bail</i> required	Page 56
In Lord <i>Wentworth's</i> Time 10 l sufficient	<i>ib.</i>
The <i>Form</i> of the Common <i>Bail Piece</i> before the 12 <i>Geo.</i> 1.	<i>ib.</i>
— altered by that Statute	<i>ib.</i>

Of the Defendant's Appearance in the Common Pleas.

Much Matter depended on it	<i>ib.</i>
Originally the <i>Defendant</i> appeared in <i>Person</i>	<i>ib.</i>
Of casting an <i>Essoin</i> , what	<i>ib.</i>
Why the <i>Filazer</i> , and not the <i>Prothonotary</i> , signs <i>Supersedeas's</i> before <i>Declaration</i>	<i>ib.</i>
<i>Essoin Day</i> , who so called	57
<i>Exception Day</i> , why so called	<i>ib.</i>
<i>Retorna Brevium Day</i> , why so called	<i>ib.</i>
<i>Appearance Day</i>	<i>ib.</i>
<i>Plaintiff</i> used to appear in <i>Person</i>	<i>ib.</i>
<i>Processes</i> on Defendant's not appearing	58
By <i>Magna Charta</i> none were to be imprisoned, <i>nisi per Legale, &c.</i>	<i>ib.</i>
It was Part of the Common Law to commit for <i>Contempts</i>	<i>ib.</i>
The <i>Capias Alias</i> and <i>Pluries</i> , grounded on the Defendant's <i>Contempt</i> in not appearing	59
Sheriff was not obliged to take <i>Bail</i> , unless Defendant sued out a Writ of <i>Mainprize</i>	<i>ib.</i>
Until 33 <i>H.</i> 6.	60
When <i>Special Bail</i> required	<i>ib.</i>
By entring <i>Ne recipiatur</i> with the <i>Filazer</i>	<i>ib.</i>
Came	

CONTENTS.

xxiii

Came in on returning the <i>Capias</i> by <i>Cepi Corpus</i> , see Note	Page 60
Bail used to be put in, in <i>Town</i>	61
<i>Commissioners</i> to take <i>Bail</i> not appointed until 4 <i>W. & M.</i>	<i>ib.</i>
Of filing <i>Common Bail</i> , and entering <i>Appearance</i> on Service of the <i>Process</i> with <i>English</i> Notice, see Note why <i>English</i> Notice	63
Of filing <i>Declaration</i> , and giving <i>Notice</i> thereof, &c. in Case of no <i>Common Bail</i> or <i>Appearance</i> by the Defendant	66
This Method contradictory to the old Rules of Practice	<i>ib.</i>

Of the Declaration in the King's Bench.

A <i>Declaration</i> , what	68
The Difference between the <i>Declaration</i> and a <i>Count</i>	<i>ib.</i>
Used to be filed by the <i>Clerks</i> in the <i>King's Bench</i> Office	<i>ib.</i>
Attornies at large did not file their own Pleadings till after the Fire of <i>London</i>	69
The old Method of <i>declaring</i>	<i>ib.</i>
Of <i>filing</i> and <i>continuing</i> it	<i>ib.</i>
This long disused, except, &c.	<i>ib.</i>
Of making up the <i>Paper Book</i>	70

Of the Declaration, and declaring in the Common Pleas.

The old Method of <i>declaring</i> , &c.	<i>ib.</i>
Why <i>Summonitus fuit</i> & <i>Attachiatus fuit</i> used by the <i>Prothonotaries</i>	70, 71
	The

C O N T E N T S:

The <i>Original Writ</i> the Guide for the <i>Declaration</i>	Page 72
<i>Declaration</i> said to be an <i>Exposition of the Original Writ</i> , why	<i>ib.</i>
No Variance was to be between the <i>Declaration</i> and the <i>Original</i>	<i>ib.</i>
The <i>Original</i> used to be repeated therein	73
An Example thereof	<i>ib.</i>
Discontinued by Rule <i>Car. 2.</i>	75
<i>Therefore he brings his Suit, &c.</i> why	74
Answered by the <i>Quando, &c.</i> in the Plea	<i>ib.</i>
The Reasons of the Difference of the formal Parts of the Declarations	75, 76
Examples thereof	77, &c.

Of the Venue.

The Distinction between <i>transitory</i> and <i>local</i> Actions, when it begun, and what gave Rise to it	90
Of <i>changing</i> the Venue	<i>ib.</i>
Of the <i>Time</i> of laying the <i>Action</i>	91

Of Imparlances.

An <i>Imparlance</i> , what	92
Why in the <i>King's Bench</i> formerly allowed in all Cases	<i>ib.</i>
Why in the <i>Common Pleas</i> not so	93
Of the <i>Entry of Imparlances</i>	<i>ib.</i>
<i>Imparlances</i> taken away	94
Of the Inconveniences which may arise from the Use of it in the <i>King's Bench</i>	96, 97

Of the Plea and Pleadings.

A <i>General Plea</i> , what	98
	A

C O N T E N T S.

xxv

A <i>Special Plea</i> , what	Page 98
Of <i>Pleadings</i> in general	99
<i>General Pleas</i> introduced by Use	100
Of the several Forms in each Court	<i>ib.</i> &c.
<i>Non est factum</i> on a Bond in the <i>King's Bench</i>	<i>ib.</i>
<i>Ditto</i> in the <i>Common Pleas</i>	<i>ib.</i>
<i>Ditto</i> by an Executor, &c.	101
<i>Nil debet</i> in the <i>King's Bench</i>	<i>ib.</i>
—— in the <i>Common Pleas</i>	<i>ib.</i>
—— in <i>Quitam</i> , &c. in the <i>King's Bench</i>	102
<i>Ditto</i> in the <i>Common Pleas</i>	<i>ib.</i>
<i>Non detinet</i> in Debt in the <i>King's Bench</i>	<i>ib.</i>
<i>Ditto</i> in the <i>Common Pleas</i>	103
<i>Ditto</i> in Case in both Courts	<i>ib.</i>
<i>Nil debet nec detinet</i> in both	<i>ib.</i>
<i>Non fregit Conventionem</i> for either	<i>ib.</i>
<i>Non Assumpsit</i> in the <i>King's Bench</i>	104
—— in the <i>Common Pleas</i>	<i>ib.</i>
<i>Ditto</i> by an Executor for either	<i>ib.</i>
Not guilty in Case in the <i>King's Bench</i>	<i>ib.</i>
—— in the <i>Common Pleas</i>	105
—— in Trespass in the <i>King's Bench</i>	<i>ib.</i>
—— in Trespass in the <i>Common Pleas</i>	<i>ib.</i>
—— in Trespass and Assault for either	<i>ib.</i>
The common <i>Replication</i> to these	<i>ib.</i>
Of <i>Special Pleas</i>	106
Of the Order of Pleading	<i>ib.</i>
In <i>Abatement</i> , what	<i>ib.</i>
In <i>Bar</i> , what	<i>ib.</i>
Anciently reduced to a general and concise Form, &c.	<i>ib.</i>
The apt and formal <i>Beginnings</i> and <i>Conclusions</i> of them	107
<i>Special Pleadings</i> , how divided	108
—— how anciently called	<i>ib.</i>
	<i>Double</i>

C O N T E N T S.

<i>Double Pleas</i> , not anciently allowed	Page 109
—— why	<i>ib.</i>
—— allowed by 4 & 5 Q. Ann	<i>ib.</i>
Sir <i>Matthew Hale's</i> Remarks on the Length of Special Pleadings in his Time	110
Lord <i>Coke's</i> Observations thereon	111
Of the Length and Intricacy of Special Plead- ings as now in Use	112, &c.

Of an Issue.

An <i>Issue</i> of two Kinds, in <i>Law</i> and in <i>Fact</i>	115
—— in <i>Law</i> , what	<i>ib.</i>
—— in <i>Fact</i> or <i>Fact</i> , what	<i>ib.</i>
Of making up an <i>Issue</i> in the <i>King's Bench</i>	116
Of the <i>Memorandum</i> , see Note	117
It's Significahcy	<i>ib.</i>
<i>Pledges</i> omitted, why	<i>ib.</i>
Notes thereon	<i>ib.</i>
Notes on the Awards of the <i>Venire</i>	118, 119
Examples of varying the <i>Memorandum</i>	120, &c.
The <i>Dies datus</i> , what	120
Of the <i>Entry</i> of an <i>Imparlance</i> , when of a sub- sequent Term	122
The Inconveniencies of it	123

Of making up an Issue in the Common
Pleas.

As anciently done	124
The present Method	<i>ib.</i>
Example thereof	125
The <i>Dies datus</i> , as used in the <i>King's Bench</i> , not used in the <i>Common Pleas</i> ; why	126
Of the <i>Difference</i> in the Award of the <i>Venire</i>	<i>ib.</i>
No Record of <i>Nisi prius</i> until, &c.	127, 134
Of	

C O N T E N T S.

xxvii

Of the Statute of <i>Nisi prius</i>	Page 127
Observations on the <i>Venire</i> , and it's Use	128
It was the only Writ used for Trial	154
How the <i>Habeas Corpora</i> and <i>Distringas</i> came in	129
Of continuing the <i>Venire</i> by <i>Vicecomes non misit Breve</i>	134

Of making up the *Nisi prius* Roll, or Record for Trial.

By whom anciently done	136
Examples of the present Method in the <i>King's Bench</i>	137, &c.
Of the <i>Placita's</i>	138
Of the <i>Award</i> of the <i>Distringas</i> ,	141
Notes on the <i>Adjournment-Day</i> , or <i>Day in Bank</i>	139
Of the <i>Nisi prius Clause</i>	141
Of the supposed <i>Default</i> of the <i>Jurors</i> , &c. <i>ib.</i>	
Of the <i>Dies datus</i> , &c.	140

Of making up the *Issue* in the Common Pleas.

Examples thereof as now used	142
Why no <i>second Placita</i> is used (as is done in the <i>King's Bench</i>) except, &c.	<i>ib.</i>

Of the *Jury-Processes*, viz. the *Venire*, *Distringas*, and *Habeas Corpora*.

The <i>Form</i> of the <i>Venire</i> in the <i>King's Bench</i> , as now used	145, &c.
Notes on it's several Parts	146, &c.
The <i>Form</i> of it in the <i>Common Pleas</i>	148, &c.
The	

The <i>Form</i> of the <i>Distingas</i>	Page 149, 150
Notes on it's several Parts	<i>ib.</i>
The <i>Form</i> of the <i>Habeas Corpora</i>	151
The <i>Tenor</i> of the <i>Distingas</i> and <i>Habeas Corpora</i> to one and the same Purpose, &c.	152
Why they differ in <i>Form</i>	<i>ib.</i>
Until 43 <i>Ed.</i> 3. the <i>Venire</i> was the only Process for summoning a Jury, &c.	153
Why the <i>Distingas</i> and the <i>Habeas Corpora</i> were introduced	<i>ib.</i>

Of Justices of Assize, and *Nisi prius*.

<i>Assizes</i> , why called so	156
<i>Justices</i> of <i>Assize</i> and of <i>Nisi prius</i> to be considered in different Lights	159
The <i>Nisi prius</i> Day, and Day in <i>Bank</i> esteemed in Law as one Day for some Purposes	<i>ib.</i>

Of the Trial, Jury, and Tales.

A <i>Trial</i> , what	161
The <i>Qualifications</i> of the <i>Jury</i> as required by the Writ	<i>ib.</i>

Of challenging the Jury.

<i>Challenge</i> , what	163
<i>Challenge</i> to the <i>Array</i> , what	<i>ib.</i>
—— to the <i>Poll</i> , what	164
The Causes of <i>Challenge</i>	<i>ib.</i>

Of the Verdict.

A <i>Verdict</i> , why called so	165
—— is either <i>General</i> or <i>Special</i>	<i>ib.</i>
A <i>General Verdict</i> , what	<i>ib.</i>
A	A

C O N T E N T S.

xxix

A <i>Special Verdict</i> , what	Page 165
A <i>Nonsuit</i> , what	<i>ib.</i>
—— no Bar to a new Action	<i>ib.</i>
The Difference between a <i>Nonsuit</i> and a <i>Retraxit</i>	<i>ib.</i>
A <i>Retraxit</i> must be in Person	166

Of the *Poslea*.

A <i>Poslea</i> , why called so	167
The Form of a <i>Poslea</i> at the Assizes, in the King's Bench, &c.	167, 168
Notes thereon	<i>ib.</i>
The Form of the <i>Poslea</i> in Town for the Plaintiff on <i>Default</i> in the King's Bench	169
—— at the Assizes for the Plaintiff on <i>Non Assumpsit</i> in the Common Pleas	<i>ib.</i>
—— in Town in the Common Pleas by <i>Default</i>	170
The same where the Defendant appears	<i>ib.</i>
—— for Plaintiff on <i>Nil debet</i>	171
—— for Plaintiff in <i>Trespas</i> s	<i>ib.</i>
—— for Plaintiff in <i>Ejectment</i>	<i>ib.</i>
—— in <i>Ejectment</i> , Guilty as to Part, Not guilty as to the Residue	<i>ib.</i>
For the Plaintiff on <i>Plene Administravit</i> in the King's Bench	172
How it differs in the Common Pleas	<i>ib.</i>
For the Defendant on <i>Not guilty</i> in <i>Trespas</i> s	<i>ib.</i>
One Defendant guilty in <i>Trespas</i> s, the others not	173
That Testator <i>Non assumpsit</i>	<i>ib.</i>
Part for Plaintiff, and Part for Defendant on <i>Assumpsit</i>	<i>ib.</i>
For Defendant in <i>Trespas</i> s on the Statute of Limitations	174
The Entry when Plaintiff is <i>non-pros'd</i>	<i>ib.</i>

C O N T E N T S.

The <i>Entry</i> in the <i>Common Pleas</i>	Page 175
— where a <i>Juror</i> is <i>withdrawn</i>	<i>ib.</i>
A <i>Postea</i> , with a <i>Tales</i> in Town	176
— at the <i>Affizes</i> with a <i>Tales</i>	177
Of taxing <i>Costs</i> on the <i>Postea</i> , &c.	179

Of *Costs*.

Amerciaments were instead of <i>Costs</i> before the Statute of <i>Gloucester</i>	180
This Statute the Original of <i>Costs de incremento</i>	<i>ib.</i>
The Statutes relating to <i>Costs</i>	<i>ib.</i>
The awarding <i>Costs</i> discretionary in the Court	<i>ib.</i>
— used to be settled by the <i>Puisne Judge</i>	<i>ib.</i>
— and a Rule made upon Non-payment	<i>ib.</i>
— what <i>Costs</i> to be allowed, what not	181
— makes the Difference in <i>Costs</i> between Party and Party, and an Attorney and Cli- ent	<i>ib.</i>

Of entering up Judgment on the Roll
in the King's Bench.

Of the General Beginning by <i>Postea Continuato</i> <i>inde Processu</i>	182
The Form of the <i>Entry</i>	<i>ib.</i>
Notes thereon	<i>ib.</i>
Of Continuances by <i>Vicecomes non misit Breve</i>	184

Of entering up Judgment in the Common
Pleas.

Why they differ, and do not begin by <i>Postea</i> <i>Continuato</i> , &c. as in the <i>King's Bench</i>	185, 6
The	

C O N T E N T S.

xxxj

The Form of the <i>Entry</i>	Page 186
The old Form before Costs were given	188
Why the Judgments were to be distinguished by <i>Mi'a</i> , or <i>Capiatur</i> in the Margin	<i>ib.</i>
The Omission thereof, or putting one for the other, was Matter of Error	<i>ib.</i>
<i>Capiatur</i> Fines taken away	189
Or rather rendered certain by 4 & 5 <i>W. & M.</i>	<i>ib.</i>
The Judgment the Voice of the Law	<i>ib.</i>
In what Manner Continuances by <i>Vicecomes non</i> <i>mist Breve</i> , &c. may be supplied	190

Of an Execution.

An Execution said to be <i>Fruſtus et Finis Legis</i>	192
—— is a judicial Writ grounded on the Judgment	193
Of the <i>Ca' Sa'</i>	<i>ib.</i>
Of the <i>Fi' Fa'</i>	194
Of the <i>Elegit</i>	<i>ib.</i>

A P P E N D I X.

An Issue in Cafe, with Special Pleadings, <i>folio</i> 144. grounded on trivial Circumstances, &c.	197
Reflections on the Length thereof, with some Arguments for the Reasonableness of sup- plying special Pleadings by some more easy and cheap Method	230
An Issue in Replevin, with special Pleadings	241

A N

P
as
fo
p
U
th
th

w
g
an
T
he
fi
to
ti
th
ft
hi
in
K

A N
HISTORICAL TREATISE
O F A
SUIT at LAW.

AS the following Sheets are designed to exhibit the several *Forms* of Proceedings, used in an Action at Law in the Courts of *King's Bench* and *Common Pleas*, from the original Procefs down to the Execution; so far at least as may suffice to explain and illustrate the formal Parts of such Proceedings, and to point out the Grounds and Reasons for the Use thereof; it will be proper to say something, by Way of Introduction, concerning the Original of these two Courts.

The Court of *King's Bench* is that out of which all the other Courts of Law were originally formed. It appears from the most ancient and authentic Historians, that in the Times of the *Saxons* and *Danes* our Kings did hold a Court of Justice, wherein they used to sit in Person, and to judge not only according to Law, but also to Equity; and that as Petitions and Appeals became burthensome to the Prince, he was under a Necessity of substituting some Person to administer Justice to his Subjects. The Person so substituted was invested with proper judicial Authority as the King's Chief Justice; and as there was originally

B

but

but one Court for the Determination of *Civil* Causes of all Kinds, so he had in Effect the whole Power, not only of the Chief Justice of the *King's Bench*, but likewise of the *Common Pleas* and *Exchequer*, centered in him for a long Time, viz. 'till the Reign of King *Richard* the second, (as it is presumed) who made *two* other *Justices*, and assigned to each a distinct Jurisdiction, that is, one of the North, and the other of the South Part of *England*, which somewhat diminished the great Authority of the former, who notwithstanding was still looked upon as the Chief, and was accordingly stiled *Capitalis Angliæ* * *Justiciarius*.

The Court wherein the Chief Justice sat was Part of the King's Palace. It was called *Curia Domini Regis*, and was removeable with the King's Household. And by the 28 *Edw.* 1. c. 5. this Court is to follow the King. In this Court all Differences which happened between the Barons, and other great Men of the Realm, were heard and determined; and likewise all Causes, as well concerning *Common Pleas*, as *Pleas of the Crown*; but Matters of an inferior Nature, between Subject and Subject, as Contracts, Debts, &c. were then usually determined in the *County*, and *Hundred* Courts, which were the original Courts for such Purposes in those Days.

* *Justiciarius*—the Reason why he is called *Justiciarius*, and not *Judex*, is because in ancient Times the Latin Word for him was *Justicia*, and not *Justiciarius*, as appears by Glanvil, lib. 2. c. 6. secondly, because he has his Authority by Deputation, and not *Jure Magistratus*. See Blo. in Justice.

And it is beyond all Doubt that before the Conquest, these two Courts, the *County* Court and *Hundred* Court, had long been and then were the Chief Courts of Law for determining all Matters between Party and Party, as well Ecclesiastical as Civil, and wherein the Bishops used to preside, jointly with the Sheriff; nor can it be said with any Certainty that there were any other Courts of Law subsisting for determining Disputes between Subject and Subject; but it is observed by several Historians, that amongst other the arbitrary Proceedings of this King, the Conqueror, "The Bishops were prohibited from presiding at *County* Courts or *Shire-gemots*, in order to deprive the Bishops of their Share of the Fines or Mulcts; and that he instituted other Courts, before unknown to the English; which not only tended to the Inconvenience of the Parties, who were ignorant of the Rules and Practices of these Courts, but they were under the Necessity of following the Prince, wheresoever he went, because they always attended on him." What these new Courts were, is hard to determine, but it may be presumed, one was the Court of *Common Pleas* (now so called) for at this Time, it is well known, that with Respect to landed Property there was a General Change; and the Norman Laws took Place and were substituted instead of the Saxon Laws; and the Proceedings were carried on in the *Norman Language*; or rather that *Common Pleas*, and Matters with Respect to Land, were drawn into and determined in the *King's Court*, instead of the *County* Court. And it is very evident that most of

An Historical Treatise of a Suit at Law.

our Law Terms are derived from the Norman Language during that Period.

About the Year 1215 in the Dispute between King John and the Barons, and upon their adjusting the Articles of the two famous Charters, entitled *Magna Charta* and *Charta de Foresta*; one of the Articles was "That Sheriffs should not hold County Courts above once a Month, and that they as well as Castellans, Coroners &c. should be restrained from holding Pleas of the Crown; before which Time it is to be presumed, that the County Court used to be held oftener than every fourth Week throughout the Year as it now is, and from that Time has been the stated Time for holding of it. It is also as certain that Pleas of the Crown as well as Civil or Common Pleas were held and determined in it.

Afterwards King Hen. 3. being requested by the * Nobility, granted by *Magna Charta*, or the Great Charter, that *Communia Placita non sequerentur.*

* Gwin, in the Preface to his *Readings*, saith that until Henry 3d. granted the Great Charter, there were but two Courts in all, called the *King's Courts*, viz. the *Exchequer* and the *King's Bench*; which was then called *Curia Domini Regis*, and *Aula Regis*; because it followed the Court or King; and that upon the Grant of that Charter, the Court of Common Pleas was erected and settled in one Place certain, viz. *Westminster Hall*, and therefore, after that, all Writs ran *quod sit coram Justiciariis meis apud Westm.*; whereas before they ran *coram me vel Justiciariis meis*, without any Addition of Place, so that Common Pleas, if not tried in the County Court, which was called the Sheriffs Court, must of course have been tried in the King's Bench; and by what has been before observed, they certainly were, especially from the Time of King William the First. In short, from the best Observations which have been hitherto made

*sequerentur Curiam suam, sed in * loco certo tene-*
rentur. This Great Charter †, or the Revival
of the Saxon Laws of King *Edward* the Con-
fessor,

made, it may be collected and agreed upon, that the *County* Court took Cognizance of Pleas of the Crown in some Respects, and also of Common Pleas or Plea of Land and all other Matters between Subject and Subject until the Conquest; also that soon after the Conquest, the Norman Laws with respect to ~~Tenures~~ ^{tenures} and Services of Land took Place, and Pleas of Land were taken up and tried in the King's Bench, or rather they were tried heard and determined by Justices appointed for that Purpose, who sat in the King's Bench jointly with the Chief Justice of that Court, so that Pleas of the Crown and Common Pleas were held indifferently in the King's Court or King's Bench, and used to follow the King; also that it thus continued until the Confirmation of Magna Charta by Hen. 3d. when the Justices appointed for trying Common Pleas or Pleas of Land were ordered to sit in a fixed and certain Place and not to follow the King, (which the Chief Justice of the King's Bench continued to do) and by their being thus sever'd, they became a distinct and separate Court, viz. a Court of Common Pleas, so that this Court may be rather said to be sever'd from the other, than created by this statute, and from this Time the County Court began to lose great Part of its Business.—The Consideration of this may help to determine our Judgment with respect to what hath been said of late Years of this Court of Common Pleas; viz. that it was created by Mag. Ch.

* *In loco certo.*—*Westminster Hall*, with the *Exchequer*, was the King's Palace at this Time; the *Hall* was built by King *William Rufus*, and the Courts of Law held there; and whenever the King's Household removed from it, the Courts of Law also did, and followed the King, until the making of *M. C.* from which Time the Court of *C. P.* by virtue thereof, remained fixt, and continued to be held in this *certain Place*, notwithstanding the King's removing from it. And it has continued to be a Place for the Courts of Law ever since, unless upon very extraordinary Occasions.

† There is a notable Remark in History, that at the renewing the two Great Charters by this King, the Lords
Spiri-

fessor, had before been granted by King Henry the first, to ingratiate himself with his Barons,

Spiritual and Temporal being assembled, with each a lighted Taper in his Hand, before him in *Westminster Hall*, the Archbishop of *Canterbury* denounced a Curse against those who should violate the Laws, or alter the Constitution of the Kingdom. After which the Lords threw down their lighted Tapers upon the Ground, crying out, *So may the Souls of these*, who should violate the Charters, *smoke and sink in Hell*. So precious were those Laws then esteemed, and are now reckoned, and it is hoped ever will remain the Bulwark of *English* Liberties. This Anathema was denounced May 3, 1253. There was another Excommunication against the Breakers of this Charter, denounced the 25 *Ed. 1*.

By this last mentioned Act (25 *Ed. 1*.) it was ordained that these two Charters should be sent under the Great Seal to all Sheriffs to be published in the County Court 4 times in the Year in full County. And to all Cathedral Churches to be read to the people twice in every Year. It was also ordained “*That if any Statute be made contrary to the Great Charter, or the Charter of the Forest, that shall be holden for none*”.

It is worthy the Remembrance of every Englishman, that so great was the Power of the *Pope* at this Time, over a blind ignorant and bigotted People, that after he had interdicted the Kingdom and excommunicated King John; absolved his Subjects from their Oaths of Allegiance and not only deposed the King but absolutely gave away his Kingdom to Philip of France, and stirred up the Barons to aid Philip by making War against their King; but that King John no sooner made Peace with the *Pope*, by a most shameful Submission in resigning his Crown, without the Consent of his People, and receiving it again from Pandolph his Legate to hold as a Feudatory of the Church of Rome, and also agreeing to pay a very large Sum of Money; but his *infalible Holiness* then changed Sides; and not only absolved the King and excommunicated the Barons, but when the *Charter of Liberties* was shewn to him, for which they contended, He cry'd out. “What, do the Barons of England endeavour to dethrone a King who has taken upon him the holy Crois

An Historical Treatise of a Suit at Law.

rons, in Prejudice to his elder Brother Duke Robert, and afterwards by King John, and was a Bone of Contention between the Kings and their Subjects for near 200 Years; being sometimes granted, then recalled, not being fully confirmed to the Subjects until the 9th of this King.

By this Act, or rather Charter of English Liberties, (it not being deemed an Act of Parliament, but a new Declaration, by this King, of the old fundamental Laws of the Land or Liberties of the Subject) the Court of *Common Pleas* was severed from the *King's Bench*, (so called from an old Saxon Word, *Banc*, signifying an high Seat whereon the Kings used to sit); for before this Charter, all Pleas were held indifferently therein, and consequently the *Common Pleas* did follow the King, *Ubicunque fuerit in Angliâ*, with the Court of *King's Bench*; and though some have been of Opinion that the Court of *Common Pleas* was created by *Magna Charta*, yet by the Provision in the next Chapter, viz. *Et ea quæ per eosdem*, (i. Justiciarios Itinerantes) *propter Difficultatem aliquorum Articulorum, terminari non possunt, referantur ad Justiciarios nostros de Banco et ibi terminentur*, it is manifest that at the Time of making of *Magna Charta* there were *Justiciarii de Banco*; which must, as my Lord Coke observes, be meant of the *Common Pleas*. This is easily reconciled,

Cross and is under the *Protection* of the *Apostolic See*, and would they enforce him to transfer the *Dominions* of the *Roman Church* to others! By Saint Peter this must not go unpunish'd." And then by a definitive Sentence he damn'd and call'd for ever the *Charter of Liberties*, and sent the King a *Ball* containing that Sentence at large, See Echard, &c.

An Historical Treatise of a Suit at Law.

by considering that *Iusticiarii de Banco* used to sit, and all Pleas were held indifferently, in one and the same Court which was the *King's Bench*; but after that Charter was granted *Common Pleas* were sever'd and held apart, and became the Business of a distinct Court, viz. of the Court of * *Common Pleas*.

At this Time, 'tis said, began the Study of the *Common Law*, and the Chief Justice of the *King's Bench* was no longer stiled *Capitalis Angliæ Iusticiarius*, but *Capitalis Iusticiarius ad Placita coram Rege tenenda*, vel *Iusticiarius de Banco Regis*; and the Chief Justice of the *Common Pleas* was stiled, *Iusticiarius de Banco*.

The two Courts being thus separated, the *King's Bench* was now especially exercised in criminal Matters and Pleas of the *Crown*; and the handling of private Contracts, and civil Actions, was left to the Court of *Common Pleas*, which seem, by the 12 & 13 Ch. of M. C. to be especially limited to this Court, and the *King's Bench* to be thereby restrained from holding Pleas thereof: and therefore, afterwards, all Writs returnable in the *Common Pleas* were returnable *Coram Iusticiariis nostris apud Westmonasterium*; but Writs returnable in the *King's Bench* continued to be returnable *Coram Rege*, vel *Coram nobis ubicunque fuerimus in Angliâ*.

Therefore, when we read at this Time, (as we often may) that "The Suits in the *King's*

* The *Common Pleas* was anciently so called Anno 2 Edw. 3. c. 11. because, saith Camden, *Communia Placita inter Subditos ex Jure nostro, quod Commune vocant, in hoc disceptantur*.

“ *Bench* were originally Suits for Offences only,
“ and Matters that were against the *Peace* of
“ the Realm, &c.” here the Term originally
must be understood to mean immediately after
Magna Charta, for before the making of this
Statute (says my Lord Coke) *Common Pleas*
might have been holden in the *King’s Bench*,
and all Writs were returnable in the same *Bench*;
and because the Court was holden *Coram Rege*,
and followed the King’s Court, and was re-
turnable at the King’s Will, the Returns were,
Ubiunque fuerimus in Angliâ; whereupon ma-
ny Discontinuances ensued, great Trouble was
given to the Jurors, great Expence to the
Parties, and great Delay of Justice: for which
Causes this Clause of *Magna Charta* was made.
And the *Pleas* of the Crown were divided into
High Treason, *Misprision of Treason*, *Petty Treason*,
Felony, &c. and were limited to this Court,
because *contra Coronam et Dignitatem Regis*; so
that of these the *Common Pleas* cannot hold
Plea. But to shew that *Common Pleas* may be
holden in the *King’s Bench*, my Lord assigns
these Reasons, viz. 1st, It is to be observed,
the King is out of the Statute, and may sue in
that Court; 2dly, If a Man be *in Custody* of
that Court, any Person may charge him with
an *Action* therein for *Debt*, *Covenant*, or the
like personal *Action*, because he that is *in*
Custody, ought to have the Privilege of that
Court; 3dly, Any *Action* that is *Quare Vi et*
Armis, where the King is to have a Fine, (of
which hereafter) may be sued in that Court;
4thly, *Replevins* may be moved thither; 5thly,
Albeit originally the *King’s Bench* be restrained
by this Act to hold Plea of any *Real Action*,
yet by a Mean it may, as when removed thi-
ther

ther by a Writ of *Error* from the *Common Pleas*, &c. This leads us to shew by what Means the Court of *King's Bench*, soon after the making of *Magna Charta*, drew to itself the Cognizance of *Civil Actions*, as at this Day, notwithstanding that Statute.

First, as the Court of *Common Pleas* had it's Jurisdiction by an *original Writ* out of *Chancery*, so (after the settling that Court at *Westminster*, which became the sole Court for *Civil Matters*, and by which, great Variety of Business, and Profit accrued to it) the Court of *King's Bench*, in order to hold Plea of *Civil Actions*, very soon claimed a Right to hold Pleas of *Actions of Trespass* * *on the Case*, by the like *Original*, being made returnable therein; a *Trespass super Casum*, being considered, in it's Nature, to be an *Action of Trespass*; and all *Trespases* being *contra Pacem*, the *King's Bench*, by this Means, assumed the Cognizance thereof.

Secondly, As to Pleas of *Debt* †, and *Real Actions*, or *Pleas of Land*, they for some Time

* It was called an *Action Super Casum*, because the *Original* was framed and adapted to the Nature and Circumstances of the *Case*, according to the Statute *West. 2. 13 Ed. 1. &c.*

† *Fitzherb. N. B. fo. 119. b. & k.* declares that there is no Writ in Law for *Debt*, but a *Justicies*, which is a judicial Commission to the Sheriff to determine the Matter *ne amplius inde Clamorem audiamus*; so that the *King's Bench* ought not to be troubled with the Matter at all: or, if by *Original*, in the *Common Pleas*. Is not the *Original* itself a *Summons*? And *Kite. in Ret. Brew. fo. 4 Tit. Com. Bank*, declares, that *Summons*, *Attachment*, and *Distress*, successively distinct 15 Days, is the only Process at Common Law for *Debt*.

longer

longer continued cognizable in the *Common Pleas* only; for, as to *Debt*, that being certain and demandatory, it could not come under the Title of an Action *Super Casum*, and consequently the *King's Bench* could have no Pre-
tence for a Writ to be returnable therein, to compel a Person to appear in such an Action: therefore, at length, it became the Method of the *King's Bench*, in order to take Cognizance of *Debt* likewise, to file a *Bill* against the *Defendant*, thereby supposing him to be already in the *Custody* of the *Marshal* of the *King's Household*, (if not really so) in which Case the *Plaintiff* had Liberty to *declare* against him there in *Debt*, rather than the *Marshal* should have his Prisoner taken from him, to be charged in another Court; we may observe, that one of my Lord *Coke's* Reasons, which he assigns, why *Common Pleas* might have been holden in the *King's Bench*, is, that if the Defendant *be in Custody* of that Court, &c. and indeed this used to be the *real* Case at first, and it was not grounded on a Supposition only, as afterwards it was; and this, at length, introduced the feigned one; that is, the now present Method of *declaring* against a *Defendant* in the *King's Bench*, as being *in the Custody of the* * *Marshal of the King's Marshalsea*. And the

* *Marshal* [*Marescallus*] of the *King's House*, otherwise called *Knight Marshal*, used to exercise his Authority in the *King's Palace*, in hearing and determining all Pleas, and Suits, between those of the *King's House* and Persons within the *Verge*, and punishing Faults committed there, see 18 *Ed. 3.* &c. and *Marshalsea* was the Court or Seat of the *Marshall*. The *Marshalsea Prison*, in *Southwark*, is of late Foundation, though perhaps derived from the former.

Proceedings by the *Original* out of *Chancery* in *Actions Super Casum*, as at first used in the *King's Bench*, came to be likewise supplied by this very Method of *declaring*, and the *Original* in such Cases became to be discontinued. Hence you see arose *Actions* on the Case in the *King's Bench*, from hence *filing Bills*, and *declaring* against the *Defendant*, as in *Custody* of the *Marshal*.

As to *Real Actions*, or *Pleas of Land*, these continued still longer *cognizable* only in the *Common Pleas*, by *Writs of Right*, *Writs of Assize*, and other *original Writs* issuing out of *Chancery*, and returnable therein; but these being now generally disused, by *Ejectments* taking Place of these *Real Actions*; and as *Ejectments* are *Actions of Trespass*, (at least grounded on supposed *Trespases*) and so *contra Pacem*, they consequently became likewise *cognizable* in the *King's Bench*; but this is still upon supposing the *Defendant in Custody*, &c. for that is the Ground-work of the Cause depending there, unless it is by *Original* out of *Chancery*. So that, at present, the Court of *Common Pleas* seems to have no more to do in *Real Actions*, (except in passing *Fines* and *Recoveries*) than the Court of *King's Bench*.

The *Ejectione Firmæ's*, to recover the Possession, became frequently in Use in *Henry* the Eighth's Time, and is now the most common Means of trying Titles to Land, instead of *Real Actions*; from which Time the Courts of *Kings Bench* and *Common Pleas* seem to have had a concurrent Jurisdiction in all *Civil Matters* except as to *Fines* and *Recoveries*, as at this Day.

Of an Action.

An Action (*Quia agitur de Injuria*) is defined to be, * *A Right of prosecuting to Judgment for what is due to One's self; or, A legal Demand of One's Right.* And it is of two Kinds, one that concerns Pleas of the Crown, the other which concerns Common Pleas. And this of *Common Pleas* is divided into Actions Real, Personal, and Mixed.

The *Suit*, or following the *Prosecution* until *Judgment*, is regularly called an *Action*, but not afterwards; and therefore it is, that a *Release* of all *Actions* is not a *Release* of an *Execution*, because the *Execution* doth begin after the *Action* doth end. The Foundation of the *Action* is an *original Writ*, and doth determine by the *Judgment*; but Writs of *Execution* are called *Judicial*, because they are grounded upon the *Judgment*.

Of the commencing an Action in the King's Bench.

The Commencement therefore of an Action in the *King's Bench* was, at first, by an *original Writ* out of *Chancery*, in like Manner as was used in the *Common Pleas*; or else it was by *filing a Bill* against the *Defendant*, both which Methods still continue to be made use of, but the common Method is by *Bill*.

If the Action was commenced by *Bill*, the *Defendant* was, and now is, supposed to be

* *Actio nihil aliud est quam Jus prosequendi in Judicium quod sibi d'betur.* Co. Lit. *Action n'est autre Chose que leyal Demand de son Droit.*

An Historical Treatise of a Suit at Law.

in the Custody of the Marshal of the King's Marshalsea, as before observed. The particular old Direction of this Bill is lost by Discontinuance, though it is reasonable to suppose it was to this, or the like Purpose :

To the Justices of our Lord the King, before the King himself,

B. to wit. A. B. complains of C. D. being in the Custody of the Marshal of the Marshalsea of our said Lord the King, before the King himself. For this, to wit, That whereas, &c. setting forth the Complaint, or Cause of Action.

Upon the filing this *Bill*, a Process used to issue to summon the Defendant to appear before the Lord the King, on ——— (a certain Return Day) *wheresoever he should then be in England*, to answer the *Bill*. This Process was called a *Bill* of that County wherein the Court then resided, (as at present it is called a *Bill of Middlesex*) because the *Marshal*, being an Officer of the King's Household, (in whose Custody the Defendant was supposed to be) was then in that County, *viz.*

Middlesex, to wit. It is commanded the Sheriff, that he take A. B. if he be found in his Bailiwick, and safely keep him, so that he may have his Body before our Lord the King, on wheresoever, &c. to answer to C. D. of a Plea of Trespass, and that he have there then this Precept.

By Bill.

E ———

This

This short, and commandatory Process was signed *per Billam*, (to shew the Suit was by a *Bill* filed, and not by *Original*) and with the Name of the *chief Clerk assigned to inroll Pleas in the Court before the King himself*; and it issued upon the *Bill's* being filed: but in case the *Defendant* had made his Escape, and was not to be found in that County, (which was supposed to be the Case when the Defendant lived in any other County) then the Sheriff returned the Writ with *Non est inventus*; upon which a second Writ issued into the County where the Defendant lived or was thought to be. This second Writ was called a *Testatum*, but it afterwards gained the Name of a *Latitat*, from that Word therein, *Cum Testatum est quod Latitat, &c.* and is in the Nature of a *Testatum Bill*; and in this second Writ of *Latitat*, the very *Return* of the *Bill* used to be inserted therein, instead of the Words "*At a certain Day now past, &c.*" till which Time the *Latitat* could not issue. Afterwards it became the Method, first to sue out a *Bill*, and to get it returned of *Course* by the Sheriff, and then to sue out a *Latitat*; and this Method continued (as 'tis presumed) a long Time, (*i. e.* until about 90 Years ago) when for easing the Subject, and for expediting Justice, (as it was called) it was contrived to put these two Writs in one; so that the Defendant might be attached in any other County than that wherein the Court resided, without first suing out and filing the *Bill* of *Middlesex*. And this was done, by only supposing in the *Latitat*, that a *Bill* had issued, and was returned, *Non est inventus*, and filed; as the *Latitat* itself now plainly shews, *viz.*

GEORGE

GEORGE the Third, &c. To the Sheriff of B. greeting. Whereas we lately commended our Sheriff of Middlesex, that he should take A. B. and C. D. if they might be found in his Bailiwick, and keep them safely, so that he should have their Bodies before Us at Westminster, at a certain Day now past, to answer to E. D. in a Plea of Trespas; and our said Sheriff of Middlesex at that Day returned to Us, That the aforesaid A. and C. are not found in his Bailiwick: whereupon, on the Behalf of the said E. it is sufficiently attested in our Court before Us, that the aforesaid A. and C. do run up and down, and secret themselves in your County. Therefore we command you, that you take them, if they may be found in your Bailiwick, and safely keep them, so that you may have their Bodies before us at Westminster, on next after to answer to the aforesaid E. of the Plea aforesaid; and that you have there then this Writ. Witness, W. Lord M. at Westminster, the Day of in the first Year of our Reign. Lee.

A. B. and C. D. you are served, &c. V. post.

Though this first Process is called a *Bill*, (in all Probability from the Words *per Billam* at the Bottom, to shew it is grounded on a *Bill* filed, and was not by an *Original* out of *Chancery*) yet this is not that *Bill*, you see, which supposes the Defendant to be in the *Custody of the Marshal*, &c. This *Bill*, or *Process*, is a *Summons* only for the Defendant to appear, and answer the other; which, consequently, was filed before this *Process* issued. Nor is this called simply a *Bill*, but

a *Bill of Middlesex*, to distinguish it from the original *Bill*, or *Declaration*, (which in this Court is called a *Bill*) and used to be filed before the Process issued, or against the Return thereof: and such a *Bill* is still presumed to be filed, to warrant every *Declaration* in this Court, (though it is never filed now, but of Necessity, unless it be against Prisoners, or Attornies and Officers of the Court) and upon the Defendant's Appearance, the *Declaration* is received as a Copy of it only. See *Styles's Pract Reg.* 210. where the *filing* the *Bill* is said to be the Ground-work of the Cause depending; and is, as the *Original* in the *Common Pleas*, which gives the Court a *Jurisdiction* to hold Plea of the Matter therein complained of.

Having seen the Original and Nature of the *Bill*, by which a Suit was, and is now usually commenced in the *King's Bench*, and of the *Summons*, that is, the *Bill of Middlesex*; let us see how a Suit used to be, and is now begun in the Court of *Common Pleas*.

Of the Commencement of an Action in the Common Pleas.

Since *Magna Charta*, the Commencement of every Suit in the *Common Pleas* (unless against Attornies and Officers of the Court) is by an original *Writ* issued out of the Court of *Chancery*; which, by it's being made returnable therein, gives the Court a *Jurisdiction* to hold Plea of the Matter therein specified; (as it does the *King's Bench*, when made returnable in that Court) for though this Court was severed from the *King's Bench* by *Magna Charta*, for the trying of *Common Pleas*; yet it had not an

Authority thereby to proceed in such Matters *ex Officio*; but there was from the Beginning a Precedent for it's Proceedings, and Rules of Practice; and that was the *County Court*; now as the Sheriff in his *County Court* could not take Cognizance of a Plea of Debt, or Damages, above forty Shillings, without the King's Writ; therefore in every such Case, a Writ issued out of the Chancery directed to the Sheriff to give him a Jurisdiction to hold Plea thereof, and was the original Writ for trying such Causes: So the *Common Pleas*, being designed to be a Court of a superior Nature to this, in all Matters of a civil Nature, between Subject and Subject, required something in every such Cause to give it a Jurisdiction to proceed therein; and this was done, by taking the like Original Writ out of *Chancery*, as was used for the *County Court*, but made returnable before the Justices of his Majesty's Court of *Common Pleas* at *Westminster*; the very issuing of the Writ, supposes the Cause of Action to be above forty Shillings, and also that the Court ought not, or rather, that it is beneath the Dignity of the Court to take Cognizance of any Thing under; and it seems that much of the Method of the Practice of the *County Court* was taken up by this; for Instance, at this Time the old Law of *Frankpledge* *, as established by King *Alfred*, still

* It is observable that though the Law of *Frankpledge* is disused as obsolete; yet it was never legally set aside: therefore the Summons grounded on the Plaint in the *County Court* very reasonably continues the old Form, viz. *Berks, to wit, W. E. Esq; Sheriff of the County aforesaid, To the Bailiff of the Hundred of O. and R. S. my Bailiff jointly and severally greeting. Because A. B. at my Court held*
for

still prevailed in all the Kingdom; and therefore the Original was framed in pursuance of it, and *Pledges to prosecute* used to be returned thereon. Now the Method of procuring this Original was, by making a short Note to the *Cursitor* of the County, which Note was called a *Præcipe*, or *Pone*. These were varied according to the Nature of the *Action*; and four Defendants, and no more, were to be inserted therein: And upon this, the *Cursitor* made out the Original, and gave it to the *Attorney*; under Seal. The Original in Case run thus:

CHARLES, *by the Grace of God, &c.* To the Sheriff of Berkshire, greeting. If A. B. makes you secure to prosecute his Claim, then put C. D. late of Wantage, in your County, Yeoman, by sure and safe * Pledges, that he be before our Justices at Westminster, in eight Days of St.

for the County aforesaid, complains against C. D. of a Plea of Trespass on the Case; and hath found Pledges of prosecuting and so forth, Therefore I command you and each of you that you summon, &c.

* Pledges.—*Plegii dicuntur Personæ qui se obligant ad hoc, ad quod qui eos mittit tenebatur.* The Reason of these Pledges is set forth in the Writ, and they used to be actually found, and stand Securities to answer the Fine; and also such Costs and Damages as the Defendant or Tenant should be put to in all Personal or Real Actions. Afterwards they were only found in Real Actions; but as these came to be disused, they were, and are now, become feigned Pledges, and used only as Matter of Form, to agree with the Writ, and signify now nothing, unless to shew what the Practice once was. It is said, that if the Plaintiff was a poor Man, and could not find Pledges, he pledged his Faith, and then the Writ run, “If A. B. shall make you secure to prosecute his Claim by his Faith, because he is poor, then put, &c.”

Hilary, to answer to the said A. B. in a Plea, that * whereas the said C. D. on the 10th Day of December in the second Year of the Reign, &c. (so on, reciting the whole Complaint or Declaration in the Writ) to the Damage of the said A. B. 30 l. and have you there the Names of the Pledges, and this Writ. Witness Ourself at, &c.

* The Original, we observe, was twofold; first, for the Sheriff to take Security from the Plaintiff to prosecute his Suit, *si fecerit te securum, &c.* and then to put or summon the Defendant, *tunc pone, C. &c.* nor indeed could the Sheriff even summon him by good Summoners (as the Method then was) except the Plaintiff had first indemnified him by giving good Pledges, that his Claim was just as the Words of the Original did import, *viz. si A. B. fecerit te securum de clamore suo prosequendo tunc Summoneas C. D. per bonos Summonitores, &c.* which shews what excellent Provision the Common Law made to prevent frivolous, vexatious, and groundless Suits; nor was it less careful in securing a Man's just Right and Property; and this was taken up by the Courts of King's Bench and Common Pleas, from the general Law

* In the Original, the Complaint, or Declaration, is fully set forth, that the Defendant might know the Cause of Action; but in the King's Bench it is set forth in the Bill filed, as that is the Original there, to which the Defendant, by the Bill of Middlesex, was summoned to appear and answer; and he being supposed to be already in the Custody of the Marshal, there was no Occasion for any other Addition: and we may suppose this is still the Reason why no Addition is given to the Defendant there, as it is done in the Common Pleas.

of * *Frankpledge*, then in Use, whereby all the *Freemen* in the Kingdom were formed into such admirable Communities, and Fellowships, that all the Members thereof were Pledges for each other, and responsible for one another, as well in Cases of private Debts and Contracts, as for public Peace and Security; and therefore nothing could be bought or sold, but in the Presence of two Vouchers, at least, of the same Hundred or Community; by which you see the Common Law aimed as well to prevent the committing of Wrongs, as the providing Remedies for Wrongs, when committed. And hence on good Reason, Pledges *de Prosequendo* were introduced, and actually given by every Plaintiff in this Court, on his commencing every Suit, before the Defendant was summoned or attached to appear.

The *Original* being made out, it was given to the Sheriff to be properly executed, and returned; there was this Difference attended it: In † *Case, Trespass, Trover, and Ejectment*, an *Attachment* of the Defendant's Goods, by the Sheriff, was the first *Process* on the *Original*, in which Cases the Defendant was hurt; therefore here the Writ commands the Sheriff that he should take *Pledges* for the *Defendant's*

* *Omnis Homo qui voluerit se teneri pro libero, sit in Plegio, ut Plegius eum habeat ad Iusticiam, si quid offenderit, &c.* was the Law of *William* the Conqueror.

† It is from this, that the formal Beginnings of the Declarations in this Court vary as they do, for they still refer to this Practice. For by the Declaration in *Case, &c.* it is said the Defendant *was attached* to answer. And in *Debt, &c.* it is thereby said that the Defendant *was summoned* to answer, &c. *V. under Declaration.*

Appearance ; but in *Debt, Covenant, Annuity, Account, Detinue, and Replevin*, the Sheriff begun by summoning, or warning the Defendant to appear, in which Cases the Defendant was not hurt, in the first Instance ; and therefore here there was no Command in the Writ for the Sheriff to take Pledges of the Defendant, but in every Case the Sheriff was directed by the Writ to take Security from the Plaintiff to prosecute his Suit. The Writ run thus in *Case, Trespass, and Ejectment* :

CAR. *Ec. Vic. B. sal'tem. Si A. fecerit te securum de clamore suo prosequend' tunc pone per Vadios et Salvos Pleg. B. C. nuper de, Ec. quod sit coram Just. nostris apud Westm' in Oct. Ec. ad respond' A. D. quare cum, Ec. (vel quare Vi et Armis, Ec. ad dampnum, Ec. ut dicit Et habeas ibi nomina Pleg' et hoc Breve. Teste, Ec.*

And in *Debt, Covenant, Annuity, Account, Detinue, and Replevin*, the Writs were thus, viz.

CAR. *Ec. Vic. B. sal'tem. Præcipe C. D. nuper de, Ec. quod juste, Ec. reddat A. B. 50 lib. quas ei debet et injuste detinet ut dicet Et nisi fecerit et præd' A. fecerit te securum de clamore suo prosequend' tunc Summoneas per bonos Summonitores præd' C. quod sit coram Just. nostris apud Westm' in Oct. Ec. ostensurus quare non fecerit Et habeas ibi sum' et hoc Breve, Teste, Ec.*

Only

Only in *Covenant* it was, *quod teneat*, &c. *Conventionem*, &c. And in *Replevin*, *quod juste et sine Delatione Replegiari fac' A. &c.*

However, notwithstanding this, the Sheriff used to take *Pledges* in *Debt*, &c. for unless he did, it was thought there was not sufficient Authority from the *Return* to warrant any further Process. In neither Case originally was the *Body* of the Defendant *arrested*, so tender was the Law of a Man's Liberty; unless the Sheriff returned *Summoneri feci in Trespass*, &c. and the Defendant did not appear, then the Court awarded a *Capias*, or a *Disstringas*, as they thought fit; and in *Debt*, &c. the Court awarded an *Attachment* and *Distress infinite*: but when the Sheriff returned *Nil habet* on the *Original*, then the *Capias* was awarded even in *Debt*, and so on to the *Alias & Pluries*, and then to the *Outlawry*, on *Non est inventus* returned on these Writs.

We may observe that these Processes were only to enforce the Defendant's Appearance, and issued on his Contempt in not appearing, on being summoned; for if the Defendant appeared after an *Attachment* or *Disstringas*, his Goods were thereupon discharged by the Court; and if he was arrested on the *Capias*, he could sue out a Writ of *Mainprize*.

But when those real Pledges came to be refused, the Sheriff afterwards used to return the *Original* of course, thus:

Pledges to prosecute { John Doe
and
Richard Roe.

An Historical Treatise of a Suit at Law.

The within named C. D. hath nothing in my Bailiwick whereby to summons him. The Answer of A. C. Esq; Sheriff.

Upon which it was carried to the *Filazer* of the County, for such further Process to be made out thereon as was required, either to *arrest* the Defendant, or sue him to an *Outlawry*; and then the *Original* was filed by the *Filazer*, with the *Custos Brevium*, for a Testimony that the Court had a Jurisdiction to take Cognizance of the Matter therein; for upon filing the Writ, the Court became possessed of the Suit.

But still the more ancient Practice was, (before these common or feigned *Pledges* became absolutely in Use) that when an *Original* was sued out against a Knight, Esq; or Gentleman of Worth, who had sufficient Lands or Tenements in the County, for the Sheriff still to execute the *Original*, by summoning the Defendant; for if it was returned of course by *Nil habet* as above, the Defendant might have brought his Action against the Sheriff for disabling him in his Estate. And if *Pledges* were not found to the Sheriff, by the Plaintiff (or in the *Chancery* before upon taking out the *Original*, which used often to be done for Expedition) yet they might be found afterwards in the Court wherein the Writ was returnable, rather than the Writ should abate for want thereof. And but of late Years, notwithstanding the Disuse of *real Pledges*, if these *common* or feigned *Pledges* were not returned by the Sheriff, upon the *Original*, it was *Error*, and the Defendant might plead it in *Abatement*. How was this
con-

consonant to reason? Severe Practice indeed! But this, though late, was remedied in *Baynton v. Mayser et al' Pas.* 16 Car. 1.

On the Disuse of *real Pledges*, a new Method of Practice was introduced; for the Method of first suing out, and executing, or even getting the *Original* first returned of course, came to be dropped; and for Ease and Expedition, the Practice came to be, for Attornies to make out a *Præcipe* for a *Capias*, which the *Filazer*, as now, made out, and afterwards, at his Leisure, entered the same upon a Roll; which Roll, at the End of the Term, he delivered to the Curfitor, who thereby made out the *Originals* to warrant such *Capias's* all at once; and giving them to the *Filazer*, he filed them with the *Custos Brevium*, which Practice is still used; so that the *Original* is, now, become a meer useles, and as it is presumed, an unnecessary Process, unless considered as a Process sued out, and filed, meerly to give the Court a Jurisdiction to hold Cognizance of the Matter therein, which certainly was not the only End and Intent of it.

An *Outlawry*, originally, was not used in *Civil Actions*; for in the Reign of that ever memorable, great and good King *Alfred*, and until long after the Conquest, no Man was outlawed but for *Felony*, the Punishment whereof was Death; and therefore an Outlaw was said to bear *Caput Lupinum*, because any Man might kill him, he being out of the Protection of the King's Laws, as he might kill a Wolf, which was then esteemed the most pernicious Animal that infested the Kingdom.

Ut-

Utlegatus et Waiviata Capita gerunt Lupine,
quæ ab omnibus impune poterunt amputari; me-
rito enim sine lege perire debent, qui secundum
legem vivere recusant; also utlage pur felonie
teigne leu pur loup, et est crible Woolfershered,
pur ceo, que loup est beast bay de tous gents, et
de ceo en avant list al ascun de le occire or feor
del loup, dont custome solvit leu avoie dun man
del countie pur chascun teste de utlage et de loup,
&c. i. e. an Outlaw for Felony holds the Place
 of a Wolf, and is called Wolf-head, because
 that, as a Wolf, he is hated of all Men, and
 because it is as lawful for any one to kill him,
 as he might a Wolf; of whom it is said, that
 it was the Custom to have of the Sheriff of the
 County, as a Reward for each Head of an
 Outlaw, and a Wolf, &c. *Wingate* says a
 Mark, which was then a great Piece of Mo-
 ney, and consequently a considerable Reward.
 Therefore, considering it was not only lawful,
 but meritorious to kill an Outlaw, there is no
 Room to wonder why it was then common
 for Outlaws to fly to the Woods for Shelter,
 some of whom, as *Robin Hood*, and others,
 have transmitted their Names to Posterity by
 their Audaciousness. In *Bracton's* Time it was
 resolved, that Process of Outlawry should lie
 in all Actions that were *Vi et Armis*. By the
 Stat. 13 Ed. 1. it lies in Account; and it was
 not until the Beginning of the Reign of Ed. 3.
 that it was resolved, "That for avoiding In-
 "humanity and Christian Blood, it should not be
 "lawful for any Man, but the Sheriff, to put
 "an Outlaw to Death, though it was for Felo-
 "ny." By 25 Ed. 3. c. 17. it lies in Debt,
Detinue, and *Replevin*; and by the 19 Hen. 7.
 the like Process lies in Case, as in *Trespas*; so
 that

that an *Outlawry* is now grounded on an *original Writ* in every Circumstance. But Process of *Outlawry*, being to put the Defendant out of the King's Protection, and by which he forfeited all his Goods, and was imprisoned, and lost the Profits of his Land; great Care was formerly taken that no Person should be outlawed without sufficient Notice, and therefore it was, that *three Capias's* should issue, before there should be Process of *Outlawry*, i. e. the *Capias*, *Alias*, and *Pluries*. Thus when a *Capias* issued upon the Return of the *Original*, and that *Capias* was returned *Non est inventus*, the *Alias* issued; and upon *Non est inventus* returned on the *Alias*, the *Pluries* issued; and upon the Return thereof, Process of *Outlawry* issued. How far this Law was abused, may be imagined by the * Stat 6 H. 8. that no Man shall be outlawed before he is proclaimed in the County wherein he lives, or did last live; and by the 31 Eliz. c. 3. that the Sheriff is to make three Proclamations, the first in full County, i. e. at the Sheriff's *Torn*, the second at the *Sessions*, and the third near the Church Door where the Defendant lives.

These three Writs now, are made out all at once by the *Filazer*, and returned of course by the Attorney himself, merely as introductory to the Process of *Outlawry*, without any Summons or Notice to the Defendant, otherwise than by the Proclamations. But, in short, an *Outlawry* in civil Actions is only necessary against a Man of Worth, where it may serve to com-

* It is presumed this Statute gave Rise to the Writ of Proclamation.

pel his Appearance, in order to get *Judgment* and *Execution*.

It is to be noted, that the Court of *King's Bench* cannot proceed to *Outlawry*, but by an *Original* out of *Chancery*, returnable therein.

And here one Thing remains to speak of relating to this *original Writ*, and that is, with respect to *Fines* upon *Originals*.

Sir *Matthew Hale* tells us, That before and until the Reign of King *John*, *Fines* used to be imposed *pro stultiloquio*, from whence arose those common *Fines pro pulchre Placitando*. As the first were imposed in order to enforce Plainness and Perspicuity in our Pleadings, so the last were no other than *Fines* imposed by the Court for Profit; and oftentimes considerable Sums of Money, Horses, or other Things were given to obtain Justice; and he gives us an Instance, *inter Placita incerti Temporis Regis Johannis*, the Men of *Yarmouth* against the Men of *Hastings* and *Winchelsea*, wherein it is said, "*Afferunt Domino Regi tres Palfredos et sex Asturias Narrenses ad Inquisitionem habendam per Legales, &c.*" and that frequently the same was done, and often accounted for in the Pipe-Office under the Name of *Oblata*.

But this was in part remedied by King *John* and *Henry the Third's* Charters, *Nulli vendemus Justiciam vel Rectum*. However, *Fines* upon * *Originals*, being then become certain,

* It has been observed, that there were *Originals* issued out of *Chancery* long before the *Common Pleas* was severed by *M. Ch.* for even in the *County Courts*, if the
Debt

cer
tho
yet
Kin
Cou
Cou
bec
Cou
spe
of a
prop
con
was
pear
as it
was
Fin
O
mos
used
cert
Fine

Debt
Sheri
Justic
Cour
could
Plea
Writ
the C
and I
And
to Fir
sonab
M. C
of Ch
be tak

certain, have continued to this Day; and though it is uncertain when those Fines arose, yet it is certain they were to purchase the King's Favour or Leave to prosecute in his Courts, rather than in the County or Hundred Courts, or the Courts of their Lords; and they became ('tis said) a considerable Profit to the Court, seeing, that if the Debt or Damages specified in the *Original* exceeded 40 *l.* a Fine of a *Mark* was to be paid to the King, and so proportionably for a larger Sum. But if we consider the Value of Money, and that no Fine was paid for a Sum under 40 *l.* it will not appear to have been so oppressive, at that Time, as it does at present, for 40 *l.* then, I suppose, was as much as 200 *l.* is now; and yet the same Fine still remains to be taken in *Debt*, &c.

Originals on Precipe's *quod reddat* were the most common Writs upon which those Fines used to be taken (the Sum therein being ascertained) at the Beginning of a Suit; but Fines upon Trespasses, &c. were according to

Debt was above 40 *s.* there always issued a *Justicies* to the Sheriff to enable him to take *Cognizance* of it; which *Justicies* was an *Original*. And with respect to Lords of Courts, it was a *Maxim* among the Normans, *That no one could hold Plea of Lands without the King's Patent, nor Plea of Debt above 40 s. without the King's Writ.* The King's Writ was the *Original* issued by the Chancellor, who had the Custody of the Seal of the Court, both for Writs and Patents; which, originally, were formed by him. And from what is observed by Sir *M. Hale* with respect to Fines, until the Reign of King *John*, it is not unreasonable to suppose that even in the King's Court, before *M. Ch.*, in *Civil Causes*, they proceeded by *Original* out of *Chancery*, upon which *Original*, these Fines used to be taken.

the

the Damages in the Judgment, which Fine the Court set and levied by *Capiatur* in the Judgment, which was entered up accordingly, *Et Prædictus defendens Capiatur*. And this was in all Cases, where the Plaintiff declared for a Thing done *Vi et Armis*; but by 4 & 5 W. & M. this *Capiatur* Fine in *Trespass*, *Ejectionment*, *Affault*, and *Imprisonment*, is taken away, and in lieu thereof 6 s. 8 d. is to be paid to the *Prothonotary* at the Time of signing the Judgment, which he allows the Plaintiff again in his Costs.

From hence it was, that all Matters of *Debt* might be put in the same Action, because the *Fine* upon the *Original* could be taken in Proportion to the Sum demanded; but *Debt* and *Trespass* could not, for the *Fine* in *Trespass* was to be in the Judgment, and to be set by the Court: and from this arose a Distinction between Actions, and how they were to be separated.

After the 13 Car. 2. *Præcipe's quod reddat* began to be laid * aside in *Debt*, on purpose to avoid paying this *Fine*; for it became the Practice for Attornies to make out Instructions for a *Capias clausum fregit*, with an *Ac etiam* in *Debt*, for as much as it was (according to that Statute) instead of a *Præcipe quod reddat*; and this is the present usual Practice; so that these *Fines* are not paid now, but upon *Special Originals*. As when an *Original* on a *Præcipe quare Clausum fregit* with an *Ac etiam* in *Debt* is sued out, and Judgment is signed thereon

* The Reason why *Originals* were laid aside, see *post*.

by *Default*. Now this Judgment is not warranted by that *Original*, the Writ being in *Trespass*, and the Judgment in *Debt*; and therefore, in this Case, if a Writ of *Error* is brought, the Plaintiff must purchase a *New Original* to warrant his Judgment according to the Nature of it, which is in *Debt*; and 'tis upon this *Special Original* the Curfitor takes the *Fine*; for if not so warranted, the Judgment may be set aside for *Error*. But in case no Writ of *Error* is brought, then no such *Special Original* is filed, and consequently the *Fine* is avoided; as it is if the Cause is tried upon such *Clausum fregit*, and a *Verdict* has passed, for then it is helped by the Statute of *Jeo faille*, and no *Error* lies. In many other Cases a *New Original* is necessary.

Now when we consider the Nature of these Beginnings of a Suit, that is, the *Bill* which is *supposed* to be filed in the *King's Bench*, and the *Original* which is *supposed* to be sued out, returned, and filed in the *Common Pleas*, and the *formal Parts* of our *Pleadings* which depend on each of them; when, I say, we consider the Obscurity that appears therein, we conclude, that though these, and the *formal Parts* of the subsequent Proceedings, dependant on them, might in ancient Times have been necessary and material; yet that at this Time they are become useless and unnecessary, and almost *unintelligible* Forms; and that what were then introduced for Conveniency, are now antiquated as to their Use. And yet these are continued as Things wonderfully material, and with much Exactness followed, though one may venture to say, (as it is very certain) that they

they only serve to swell the Bulk of the subsequent Proceedings, and very unnecessarily increase the Expence of a Suit, if no other Inconveniencies depended on them.

For with respect to the *Bill* supposed to be filed in the *King's Bench*, it is thereby asserted that the Defendant is *in the Custody of the Marshal, &c.* which is fictitious; also that *Pledges* are given by the Plaintiff to prosecute, &c. which is altogether as untrue; nor does it appear that ever any Process issued requiring *Pledges*, or that ever any *Pledges* were really found in this Court, yet with these the *Declaration* is concluded, and the *Memorandum* at the Beginning of the *Issue*, with the *Imparance* before the Plea, &c. depend on, and refer to it, as most of the subsequent Pleadings do in some Respect or another. And yet what is this *Bill* but a mere formal Thing grounded on Fiction, and full of Falsties, and which is, indeed, never filed but of Necessity? For the Statute of *Jeo faille* helping the Omission of *filing* and *continuing* it on the Roll, if there is no Writ of *Error* brought, there is no *Bill* filed, (unless against * Prisoners, or Attornies and Officers

* The filing a *Bill* against *Prisoners*, in the Manner as it is now done, is in no Respect agreeable to the original Use of it; for this is not done till after the Defendant has been *imprisoned* by virtue of a Process subsequent to a *Bill's* being supposed to be filed, and not till when the Plaintiff comes to declare, which supposes an *Appearance* likewise to that *Bill*. And how great is the Hardship upon these poor People that this is suffered! As Prisoners, they merit some Mercy; but instead of this, they are burthened with greater Costs than ever, for instead

cers of the Court; and in case a Writ of *Error* is brought, such a *Bill* may be filed at any Time before *Errors* are assigned. But is it not ridiculous to think, that a Judgment should be set aside for *Error*, for want of such a Piece of Formality? What is the Intent of it, that makes it so necessary? Why, it gives the Court it's Jurisdiction!

And with respect to the *Original* out of *Chancery*, (which is said to be sued out to warrant the *Capias* in the *Common Pleas*, as the filing the *Bill* warrants the *Bill of Middlesex* in the *Kings Bench*) is it not just such another formal, useless, and unnecessary Process, which draws after it many Inconveniences, and formal Matters in the subsequent Pleadings? Does it not create an extraordinary Charge for the *Capias*? Is not the *Fine*, when taken, an unnecessary Expence? They are in themselves evidently unnecessary, because we often do without, and indeed never file a *Bill* or a *Special Original*, but in Cases where they are particularly required, or purely to increase the Costs of the Defendant. Do not these Proceedings render the Beginning of a Suit ob-

stead of one *Bill*, they are saddled, I may say, with no less than *four*: for instance, When a Plaintiff comes to declare against a Prisoner, the *Bill* is filed on Stamps, and a Copy (that is, the Declaration, which in this Court is received as a Copy of the *Bill*) on Stamps is to be delivered to him in *Custody*, another on Stamps to be annexed to an Affidavit for him to give a *Rule* to plead on. One may wonder at the Necessity for all this, but so it is; and with respect to the Costs to the Prisoner, it is in Effect as so many *Bills* against him.

D

scure

secure and difficult? Or, to speak paradoxically, Is not a Suit almost always ended before it is begun? For *Judgments* are generally *first* obtained, before the Suits are thus formally begun; and then (sometimes) set *aside* for not being so. Besides, when a *Judgment* is signed, which requires a *Special Original* to warrant it, and that *Original* is not made out and filed in due Time, which is very often the Case, there must be a *Petition* to the *Master* of the *Rolls*, and an Order drawn up upon that *Petition*, which Order must be entered and filed, even for Leave for the Cursitor to make it out; by which we see how Proceedings may be enlarged, and Costs multiplied, for what, at this Time, may justly be deemed the most useless and unnecessary Proceedings in a Suit imaginable.

'Tis true, it may be said, that without such a *Bill* filed, or presumed to be filed in the *Kings Bench*, the Court has no Jurisdiction to proceed in the Cause; and without such an *Original* sued out, and filed, the *Common Pleas* has none: so that the two greatest Courts of Law in the Kingdom, wherein Right and Justice is to be administered to the Subjects, must continue to owe their Authority to meer Formality and Fiction, when it may be very easily remedied, and such unnecessary Things supplied, by only declaring the *Bill of Middlesex* or *Latitat* in the one, and the *Capias* in the other, to be the *original* and leading Process; and then, the formal Proceedings depending on the *Bill* and *Original*, with all its Obscurity, would fall of course, the Foundation being removed. And thus the Beginnings of a Suit would be rendered easy, plain, and significant.

Having

Having thus far treated of the Commencement of an Action in each Court, in the Manner they were formerly and are sometimes now used, in order to explain and render more intelligible the formal Parts of the subsequent Pleadings that depend on, or relate to them; it may here be useful to set forth and examine the Forms of the Processes or Writs themselves, as were, and are now in use, that the Changes made therein may appear. And first,

Of the Bill, or Original, in the King's Bench.

The Bill, when filed, runs thus :

Hilary Term in the 2d Year, &c.

Middlesex, ss. A. B. complains of C. D. being in the Custody of the Marshal of the Marshalsea of our Lord the King, before the King himself, for this, to wit, That whereas the said C. on the ——— Day of, &c. (setting forth the Complaint as in the Declaration, and concluding) and therefore he brings his Suit, &c.

Pledges to prosecute, { John Doe
and
Richard Roe

It has been observed why the Defendant was said to be in the *Custody of the Marshal*; but it may seem odd, why *Pledges* were indorsed upon this *Bill*, seeing no Process issued to require them. To solve this Difficulty, it may be alledged, they were brought in use from the general Law of Frank-pledge, and were

An Historical Treatise of a Suit at Law.

borrowed from the *County and Hundred Courts*; and this *Court* first introduced these feigned or formal Pledges, in order to agree, in some Respect, with the Practice of the other Courts, wherein they were really found; or rather to agree with the *original Writ* in the *Common Pleas*, which they first made use of. On filing this *Bill*, the chief Clerk's Process issued, for the Defendant to appear thereto, which Process we now call a *Bill of Middlesex*, and remains yet the same in Form, except as to the Return, the *Ac etiam*, and the *English Notice*.

The Bill of Middlesex.

Middlesex, ff. *The Sheriff is commanded to take C. D. if he may be found in his Bailiwick, and keep him safely, so that he may have his Body before our Lord the King, on ——— next after ——— wheresoever our said Lord the King shall then be in England, to answer to A. B. of a Plea of Trespass, and that he have then there this precept.*

By Bill.

(Chief Clerk's Name.)

This Process was directed to the *Sheriff*, as the proper Officer to execute the King's Writs; for though the Defendant either was, or was supposed to be already in the Custody of the *King's Marshalsea*, or *Steward* of his Household, yet as that Officer's Jurisdiction extended thro' the whole County, where his Majesty was, the *Sheriff* was, notwithstanding, the proper Officer for executing this Process, and to have the Body *wheresoever he should be at the Return*; and on this Process, (being the first after the Commencement of the Suit) the Defendant

Defendant was *arrested* or *summoned* to appear; but if he was not found before the *Return* thereof, then on *Non est inventus* returned by the Sheriff, an *Alias Bill* issued; and after that a *Pluries Bill*. But if the Defendant lived not in that County where the Court lay, then the Sheriff returned the *Bill* of course, thus:

The within-named C. D. is not found in my Bailiwick.

And then, upon filing the *Bill*, the Plaintiff was at Liberty to sue out a *Testatum Bill* into any other County, where the Defendant was supposed to be; and after that an *Alias*, and *Pluries Testatum Bill*. This *Testatum Bill* soon gained (as before observed) the Name of a *Latitat*, and runs thus:

The Testatum Bill, or Latitat.

CHARLES, by the Grace of God, of, &c.
to the Sheriff of B. Greeting. Whereas we lately commanded our Sheriff of Middlesex, that he should take C. D. if he might be found in his Bailiwick, and safely keep him, so that he might have his Body before Us, on ——— (the Return of the Bill exactly inserted) to answer to A. B. in a Plea of Trespass; And whereas Our said Sheriff of Middlesex, at that Day, returned to us that the aforesaid C. was not to be found in his Bailiwick, whereupon, on the Behalf of the said A. it is sufficiently attested in our Court, before us, that the said C. doth run up and down, and secretes himself in your County. Therefore we

An Historical Treatise of a Suit at Law.

command you, that you take the said C. if he
 may be found in your Bailiwick, and safely
 keep him, so that you may have his Body before
 us at Westminster, on _____ next after
 _____ to answer to the said A. of the
 Plea aforesaid, and have you then there this
 Writ. Witness _____ at Westminster,
 the _____ Day of _____ in the _____ Year of
 our Reign. (Chief Clerk's Name.)

This was the ancient Form, and it served
 in all Cases, as the *Bill of Middlesex* did, with-
 out ever expressing any Cause of Action, but
 only by *Trespass*, until the 13 Car. 2. c. 2.
 which enacts, That no Writ of *Trespass* should
 hold the Defendant to any Bail, &c. any further
 than an Appearance, unless the true Cause of
 Action was expressed in the Writ. So that then
 in order that these Writs should express the
 Cause of Action, as the *Common Pleas Writs*
 did; they begun to use the *Ac etiam Bille* af-
 ter the Words of a Plea of *Trespass*. And this
 was untruly said to be *secundum Consuetudinem*
Curie nostræ coram nobis exhibend', to express
 the Cause of Action, and thereupon hold the
 Defendant to Bail; as in a *Bill of Middlesex*,
 thus: "And also to a Bill of the said A. against
 the said C. to be exhibited according to the Cus-
 tom of the Court of our said Lord the King, be-
 fore the King himself, for 20 l. upon Promise,"
 or 20 l. Debt, &c. And in a *Latitat*, thus:
 "And also to a Bill of the said A. against the
 said B. to be exhibited according to the Custom of
 our Court before Us for 20 l. upon Promise,"
 or 20 l. Debt, &c. as it was, for the *Ac etiam*
 varied according to the Nature of the Action.

But about the Year —, it was contrived for the *Ease* of the Subject, and for *expediting* Justice, as it was called, to put the *Bill of Middlesex* and the *Latitat* into one; so that the Defendant might be taken on the *Latitat* in any County, without first suing out a *Bill of Middlesex*; and this was done by only supposing a *Bill of Middlesex* had issued, and was returned; and upon this the Form of the *Latitat* came to be altered to what it now is, viz.

ANN, *by the Grace of God, &c. To the Sheriff of B. Greeting. Whereas we lately commanded our Sheriff of Middlesex that he should take C. D. if he might be found in his Bailiwick, and safely keep him, so that he might have his Body before Us at Westminster, at a certain Day now past, to answer to A. B. in a Plea, &c.*

For as the *Bill of Middlesex* was not, but was only supposed to be, sued out, it was impossible to insert in the *Latitat* the very Return of it, as used to be done; and therefore the Words, *at a certain Day now past*, were introduced to supply the Return of the *Bill of Middlesex* so supposed to be sued out.

One would reasonably have imagined, that the Courts at *Westminster*, in order to *ease the Subject*, and to *expedite Justice*, might have schemed out a more easy Method, than thus putting these two Writs into one, as they might have ordered the *Bill of Middlesex* to have run into every County, and have suppressed the *Latitat*; and it might have been called a *Bill of Berkshire*, a *Bill of Oxfordshire*, &c. as well as a *Bill of Middlesex*. Is it not the King's Process, and

every *County* under his Jurisdiction? Or they might have suppressed both the *Original Bill* and *Latitat*, and have established it as a general Process for the *Commencement* of a *Suit*. This would have rendered the Beginning of a *Suit* somewhat more intelligible: but now, whenever a *Latitat* is sued out, (though it be the leading Process in every *County*, except *Middlesex*) two Things are first supposed to have been done, which are, an *Original Bill* ingrossed and filed in the Office, and a *Bill of Middlesex* sued out, returned, and filed likewise; and which, in fact, seldom or never are done.

Before the Stat. 13 C. 2. there was the greatest Abuse, that can be conceived, made of the *Bill of Middlesex*; for thereby it was in the Power of any one Man to devour the Credit of 500, by arresting them, as was then the Practice, on this Writ for large Sums; and by never *declaring*, to avoid paying any *Costs* to the Defendant. It even became a By-word to say, * *I'll bestow a Bill of Middlesex on such a one*, and this meerly to vex and disquiet a Man, or mischievously to injure and hurt him: Therefore the Intent of this Statute was to prevent frivolous and vexatious Arrests, by ordering, *that no more than 40 l. Bail should be taken, unless the true Cause of Action was expressed in the Writ*, (and this was done, as observed, by the *Ac etiam*, or else they must have had Recourse to *Originals* out of *Chancery* again) and also by subjecting the Plaintiff to pay *Costs* (for not

* This was a Complaint made, I find, in the Time of *Oliver's* Usurpation, as a Thing that had been long in Practice: How long before is hard to say; but it is very evident that it continued until the making of this Statute.

declaring)

declaring) to the Defendant on his signing a *Non pros*, which the Defendant could not do before.

But this Statute was not attended with it's desired Effect and Design, nor did it remedy those Evils the Act complains of; for it was as easy to insert an *Ac etiam* *, where there was no true Cause of Action at all, as it was to arrest a Man before any *Ac etiam* was used; for nothing more was required by this Act than that the Writ should express the Cause of Action: So that the Abuse still continued, and it was not remedied until that excellent Statute of 12 Geo. 1.

By the 12 Geo. 1. it is ordered, *That the Plaintiff, to hold the Defendant to Bail, must first make an Affidavit of his Debt, which must be sworn to be 10l. or above, and thereby set forth his Cause of Action; and if no such Affidavit is made and filed, the Defendant is not to be arrested, but to be served with a Copy of the Process, under which is to be an English Notice declaring the Intent of such Service.* And this made great Alteration in the Use of these Processes, viz. That where an Affidavit of the Cause of Action is made and filed, the Writ is made out with an *Ac etiam* as used to be, and the Sum sworn to is indorsed on the Back, that the Sheriff may know *for what* to take Bail; but if no Affidavit is made, the Defendant is not to be arrested, but to be *served* with a Copy of the Process only; in which Case

* The only Check upon the Plaintiff, from still pursuing this iniquitous Practice, was his being subject to pay Costs for not declaring in due Time; which Costs at this Time, was about 10s. only.

An Historical Treatise of a Suit at Law.

the Writ is made out *without* any *Ac etiam*, and the following *English* Notice is subjoined.

C. D. you are served with this Process, to the Intent that you may, by your Attorney, appear in his Majesty's Court of King's Bench at the Return thereof, being the Day of next, in order to your Defence in this Action.

So that our Processess now are as follow :

A Bill of Middlesex, when bailable.

Middlesex, to wit. *The Sheriff is commanded to take C. D. and J. D. if they be found in his Bailiwick, and that he keep them safely, so that he may have their Bodies before our Lord the King at Westminster, on * Monday next after eight Days of Saint Hilary, to answer to A. B. in a Plea of Trespass; † and also to*
a Bill

* All Processess and Writs in this Court are now made returnable at a *Day certain*, which before were made returnable on a general Return, *wheresoever*, &c.

† There are a great many Niceties and curious Distinctions in the Writs in Pleadings in a Suit which often pass unobserved. Here is one in the *Ac etiam*; in the Bill it is, *According to the Custom of the Court of our said Lord the King, before the King himself*; in the *Latitat* it is, *According to the Custom of Our Court before Us*. The Bill is not *tested*, but is supposed to be a commandatory Precept issued by the King's Order, and signed by his Chief Clerk, assigned to inroll Pleas before himself. The *Latitat*, and all the subsequent Processess, are *tested* in the Name of the Chief Justice of the Court, who are supposed to become possessed of the Cause upon the Sheriff's Return, and filing the *Bill of Middlesex*; *sed quare*, if not upon filing the *Original Bill*.

As

An Historical Treatise of a Suit at Law.

43

a Bill of the said *A.* against the said *C.* to be exhibited according to the Custom of the Court of our said Lord the King before the King himself, for 20*l.* upon Promise; and that he then have there this Precept.

By Bill,

Lee.

Indorsed on the Back, *Bail by Affidavit affiled for 10*l.**

A Bill of Middlesex, when not bailable.

Middlesex, to wit. *The Sheriff, &c.* (it is the same as the other, only the *Ac etiam* is omitted, and the *English* Notice is subjoined.)

By Bill,

Lee.

C. D. You are served with this Process, to the Intent that you may, &c. ut supra. So likewise is made out the *Alias* and *Pluries* Bill, with or without the *Ac etiam*, as for a Bill.

A Latitat, when bailable.

GEORGE the Third, by the Grace of God, &c. To the Sheriff of Berkshire, Greeting.

As the Cause of Action is to be sworn to, according to the 12 Geo. 1. and the Affidavit is to be filed in the Office from whence, and before, the Process issues, whereby the Cause of Action must be set forth; *Quare*, whether *Ac etiams* are not become unnecessary? The Distinction is full enough, by indorsing the Sum sworn to, for holding the Defendant to Bail in the one Case, and omitting such Indorsement in the other. And the Cause of Action is better set forth by the Affidavit; besides, the *Ac etiam Billa* refers to a fictitious Thing.

Whereas

An Historical Treatise of a Suit at Law.

*Whereas we lately commanded our Sheriff of Middlesex that he should take C. D. and R. if they might be found in his Bailiwick, and keep them safely, so that he should have their Bodies before Us at Westminster, at a certain Day now past, to answer to A. B. in a Plea of Trespass; and also to a Bill of the said A. against the said C. to be exhibited according to the Custom of our Court before Us, for 20*l.* upon Promise: And our said Sheriff of Middlesex at that Day returned to Us, that the aforesaid C. and R. are not found in his Bailiwick; whercupon, on the Behalf of the said A. it is sufficiently attested in our Court before Us, that the aforesaid C. and R. do run up and down and secrete themselves in your County. Therefore we command you, that you take them, if they may be found in your Bailiwick, and safely keep them, so that you may have their Bodies before Us at Westminster, on Monday next after eight Days of St. Hilary, to answer to the aforesaid A. of the Plea and Bill aforesaid, and that you have then there this Writ before W. L. Mansfield at Westminster, the 28th Day of November in the first Year of our Reign.*

Lee.

*Indorsed on the Back, Bail by Affidavit assised for 10*l.**

If the Latitat is not to hold the Defendant to Bail, then the Ac etiam and the Words and Bill are omitted therein; and the like Notice is subjoined, and so it is in the Alias and Pluries Latitat.

Our

Our Writs being now printed with Blanks, they run in the plural Number, in case there should be more than one Defendant to be inserted therein; but if there be but one Defendant, then *John Doe* or *Richard Roe* is added to make it agree with the printed Form.

Of the Original out of Chancery, and Processes thereon.

It has been observed, that the Commencement of a Suit in the *Common Pleas*, is by an original Writ out of the Court of *Chancery*; and the *Processes* are said to be the *Writs* and *Precepts* that go forth upon that *Original*.

The *Original* used to be procured by a *Note* to the *Curfitor*, called a *Præcipe*, or *Pone*.

The Præcipe thus :

Berks. ff. *Præcipe C. D. nuper de, &c.* and therefore called a *Præcipe*.

Berkshire to wit. *Command C. D. late of W. in the said County, Yeoman, that he render to A. B. 100 l. Debt, which he unjustly detains, &c. Ret'* — In *Detinue*, that he render to A. B. one Horse, or, &c. which he unjustly detains, &c. *Ret'*

The Pone thus :

Berks. ff. *Si. A. B. fecer' &c tunc Pone, &c. C. D. nuper, &c.* and therefore so called.

Berkshire,

Berkshire to wit. If A. B. makes you secure in prosecuting his Claim, then put by safe Gages and Pledges C. D. late of W. in the said County, Yeoman, to answer to the said A. in a Plea of Trespass, &c. setting forth the Complaint. Ret'.

The * Original on the Praecipe.

CHARLES, &c. To the Sheriff of B. Greeting.
Command C. D. late of, &c. that he justly,
and

See *Bobun's*
Eng. Lawyer.

* Here are only two Precedents given of *Original Writs*. The *Originals*, as formerly made out by the *Cursitors*, and which are now disused, being as many and as various, as the *Causes* of Action on which they were grounded; some of these *Originals* used to be proceeded on before the *Sheriff*, as a *Justices*, a *Writ of Trespass*, &c. and therefore were said to be *Vicountiel*; and these were removeable into the *King's Bench* and *Common Pleas* by another *Original Writ*, called a *Pone*, &c. The *Register*, and *Natura Brevium*, shew the Variety and Nature of *Original Writs*, which are now supplied by other Methods of Practice, both in *Real*, *Personal*, and *Mixed* Actions.

The County Courts, and Sheriff's Turn, were ancient Courts in the Time of King *Alfred*, and before. In the Turns were tried all Pleas of the *Crown*; and in the County Courts, all *Common Pleas* under 40 s. without the King's Writ; and above, to any Value, with the King's Writ, according to the Maxim, *Quod Placita de Catallis, Debitis, &c. quæ Summam 40 s. attingunt, vel excedunt, secundum Legem et Consuetudinem Angliæ, sine Breui Regis Placitari non debent*. Hundred Courts, and Courts Baron, had afterwards the same Powers granted them; and this was because Men should have Law and Justice at Home

and without Delay, render to A. B. five Pounds, which he owes to, and unjustly detains from him, as he saith; and unless he shall so do, and the aforesaid A. shall make you secure to prosecute his Claim, then summon by good Summoners the aforesaid C. that he be before our Justices at Westminster in eight Days of St. Hilary, to shew wherefore he will not do it.

Home, and not be obliged to sue in, or follow the King's Courts. But after the Court of *Common Pleas* was settled at *Westminster*, these Courts came to decline; for by the Contrivance of the Judges and Attornies, men were brought to sue in the *Common Pleas* and *King's Bench*, or rather were necessitated so to do: for what did it signify for a man to seek for Justice near Home, when after Judgment there, or before, his suit was sure to be removed by virtue of these *Original Writs* into one of the Courts above? and the *King's Bench* especially, by virtue of a Bill filed by way of *Mutatus*, (as it is said) would take Cognizance of a Cause of 5 s. and oblige a poor Man in *Tork* or *Cornwall*, not worth 40 s. to try his Cause at *Westminster*? For otherwise it was not lawful for a Man to sue in a Court of Record for a Debt not amounting to 40 s. and therefore the Courts below, in order to keep the Business there, and to prevent their being swallowed up by those superior Courts, allowed the Suitors to divide their Actions under 40 s. to hinder the Removal of them, &c. It was certainly best when Justice was provided for poor Men at their own Doors; and was the Sum of 40 s. to be multiplied to it's real worth that it was at that Time, and the Courts above restrained from taking Cognizance of any Thing under, to what a low Ebb would the Courts at *Westminster* be reduced! And notwithstanding the whole Business is now engrossed by them, how little is considered the excessive Dearness of obtaining Justice for small Sums of 3 or 4, or 5 l. &c.

And

An Historical Treatise of a Suit at Law.

And have then there the Names of the Summoners, and this Writ. Witness Ourselves at Westminster, the Day of in the Year of our Reign.

E.

An Original on the Pone.

CHARLES, by the Grace of God, &c. To the Sheriff of B. Greeting. If A. B. makes you secure in prosecuting his Claim, then put C. D. late of W. in your County, Yeoman, by safe Pledges and Gages, that he be before Our Justices at Westminster in eight Days of St. Hilary, to answer to the said A. in a plea that whereas the said C. on the first Day of May in the Year of our Lord, &c. (setting forth the Complaint, or Cause of Action, according to the Attornies Instructions) to the Damage of the said A. 100 l. and have you then there the Names of the Pledges, and this Writ. Witness Ourselves at Westminster, the Day of in the Year of our Reign.

E — .

The *Præcipe* was for Things certain, and on which the *Cursitor* received the *Fine*. The *Pone* was for Things not certain, as for *Trespases*, &c. and on which no *Fine* could be received. These Writs being returned by the *Sheriff*, were carried to the *Filazer* for such further Process to be made out as was necessary, and to be by him filed with the *Custos Brevium*; and until King Charles the Second's Time it was absolutely necessary for these Originals

ginals to be first made out and filed, because the *Declarations* were to be warranted by them; but more especially in *Trespass*, *Case*, &c. for the *Original* used to be recited fully in the *Declaration*, and the *Declaration* was to agree with it; for if there was any *Variance* between the *Writ* and *Declaration*, the Defendant could take an Advantage of it, by pleading it in *Abatement*; for which Reason the *Declaration* in this Court has been properly defined to be an *Exposition of the Original Writ*.

After *Originals* were returned of course, and *Attachments* and *Distringas's* were laid aside, but more especially after that Rule of *Car. 2.* the leading Processes were, either a *Capias quod reddat* on the *Præcipe*, or a common *Capias quare Clausum fregit* on the *Pone*.

A *Capias quod reddat*.

CHARLES, &c. To the Sheriff of B. Greeting. We command you, that you take C. D. late of W. in your County, Yeoman, if he shall be found within your Bailiwick, and safely keep him, so that you may have his Body before Our Justices at Westminster in eight Days of St. Hilary, to answer to A. B. of a Plea, that he render to the said A. 100l. which he owes to, and unjustly detains from him, as it is said; and have then there this Writ. Witness, &c.
at Westminster. T.

A *Capias quare Clausum fregit*.

CHARLES, &c. To the Sheriff of B. Greeting. We command you, that you take C. D.
E late

An Historical Treatise of a Suit at Law.

late of W. in your County, Yeoman, if he shall be found in your Bailiwick, and safely keep him, so that you may have his Body before our Justices at Westminster in eight Days of St. Hilary, to answer to A. B. in a Plea wherefore with Force and Arms he broke the Close of the said A. at W. and other Injuries to him did, to the great Damage of the said A. and against our Peace; and have you there this Writ. Witness, &c. at Westminster the Day of in the Year of our Reign. T.

This was called a *Common Capias Clausum fregit*, because the Cause of Action was not especially set forth.

If the Defendant could not be taken upon the first *Capias*, the Plaintiff had then a *Capias by Continuance*, being the same in Form, but called so by it's being continued on the Roll by the *Filazer*, from the Time the first issued, and so on from Term to Term until the Defendant was taken. But in case the Defendant was gone out of that County wherein the *Original* was filed, and as the Plaintiff could not sue out a *Capias* into any other County, therefore upon the *Capias* being returned *Non est inventus* by the Sheriff, Leave was given for the Plaintiff to take out a * *Tessatum*

* As the Plaintiff could not sue out a *Capias* but into that County wherein he had filed an *Original*, the Intent of the *Tessatum* was to enable the Plaintiff to follow the Defendant into any other County, and take him therewith. The Use of this Writ was at first much abused, in this Respect; if the Plaintiff had a Mind to try his Cause

tatum Capias into any other County, in order that he might follow the Defendant, and take him wheresoever he was to be found.

These Processes continued in Use until the Reign of King *Charles* the Second, at which Time great Amendment and Regulation was endeavoured to be made in the practical Part of the Law; for, *first*, by a Rule made for settling and regulating a Course of Practice, it was ordered, (for avoiding long and unnecessary Repetitions of the *Original Writ*, as used to be, and was then done; see under *Declaration*) that *Declarations in Actions of Trespasse, Case, &c. other than Debt, should not repeat the Original Writ, but only the Nature of the Action.* And *secondly*, by the 13 Car. 2. the Sheriff was restrained from taking any greater Bail or Security than 40 l. *unless the true Cause of Action was expressed in the Writ*, that is, in the *Clausum fregit*. And from hence arose a new kind of Practice; for as the *Original* was not to be repeated in the *Declaration*, it was very evident there was no Occasion for any

Cause in B. and the Defendant lived in *T.* the Plaintiff would file his *Original* to warrant his Judgment, and sue out a *Capias* in *B.* and then sue out a *Testatum* to take the Defendant in *T.* which put the Defendant to the Necessity of trying the Cause in *B.* and bringing his Witnesses at a great Distance: and therefore the Courts thought proper, in order to remedy this, to change the *Venue* in such Cases, upon the Defendant's Affidavit that the *Cause of Action* arose in *T.* and not in *B.* that the Cause might be tried in the proper County, if the Defendant required it.

An Historical Treatise of a Suit at Law.

Original at all, at the Beginning of the Suit, to set forth the Complaint as used to be; and therefore Attornies, instead of making a long *Præcipe* or *Pone*, for the *Cursitor* setting forth the Complaint as Instructions for the *Original*, made a short Note for the *Capias*, thus:

Berks. ff. *If A. B. makes, &c. then put, &c.*
C. D. late of W. in your county, Yeoman,
Ret. broke the Close at W.
W.

Upon which the *Filazer* (instead of the *Cursitor*) granted the *Capias Clausum fregit*, and entering this *Præcipe* on a Roll, delivered the Roll at the End of the Term to the *Cursitor*, who thereby made out the *Originals* all at once, to be filed with the *Custos Brevium*. These *Common Originals* now were only the *Clausum fregit* tested in the Name of the King, to give the Court it's Jurisdiction; but as it was necessary by the 13 *Car. 2.* to express the Cause of *Action* in the Writ, to hold the Defendant to Bail, the *Ac etiam* was introduced in the *Clausum fregit*; and from hence *Præcipe's quod reddat* began to be laid aside likewise; instead of which, in order to avoid paying the Fine, Attornies bespoke a *Clausum fregit* with an *Ac etiam* in Debt, or, &c. for as much as the Debt was, viz.

Berks. ff. *If A. B. makes, &c. then put, &c.*
C. D. late of W. in your County, Yeoman,
broke the Close at F. Ac etiam for 100 l. in
Debt, Ret. in eight Days of St. Hilary.
W.

Or,

Or, if in Case, thus :

Berks. ff. *If A. B. &c. then put, &c. C. D. late of W. in your County, Yeoman, broke the Close at F. Ac etiam in Case for 20 l. Ret. in eight Days of St. Hilary.* W.

So that the *Clausum fregit* became, and is now, the leading Process in this Court, with this Difference only ; If the Defendant is not to be held to bail, the *Clausum fregit*, without any *Ac etiam* as before, is the proper Process ; and which now, in pursuance of the 12 Geo. 1. has the like *English Notice* under it, as the *Bill of Middlesex*, or *Latitat* ; but if the Defendant was, and is now, to be held to Bail, the *Ac etiam* is inserted therein, and therefore is called a *Bailable Capias*, and the other a *Common Clausum fregit*.

A Capias, with an Ac etiam.

GEORGE the Third, &c. To the Sheriff of B. Greeting. We command you, that you take C. D. late of W. in your County, Yeoman, and R. R. if they shall be found in your Bailiwick, and safely keep them, so that you may have their Bodies before our Justices at Westminster in eight Days of St. Hilary, to answer to A. B. of a Plea, wherefore with Force and Arms they broke the Close of the said A. at E. and other Wrongs to him did, to the great Damage of the said A. and against our Peace. And also that the said C. may answer to the said A. according to the Custom of our Court of the Bench, in a certain Plea

An Historical Treatise of a Suit at Law.

of Debt upon Demand for 20 l. *And have you there this Writ. Witness Sir Charles Pratt, Knt. at Westminster, the 28th Day of November, in the 2d Year of our Reign.*

The only Instructions to the *Filazer* for these Writs are as follow :

B ——. ff. *Capias* for A. B. against C. D. late of W. in your County, Yeoman, ret. in eight Days of St. Hilary. B ———.

If bailable.

B ——. ff. *Capias* for A. B. against C. D. late of W. in your county, Yeoman, ret. in eight Days of St. Hilary. B ———.

And also for 20 l. Debt. Affidavit for 10 l.

Or,

And also for 20 l. on Promise. Affidavit for 10 l. &c.

These are the *Præcipe's* which the *Filazer* enters on the Roll, as Instructions for bespeaking the *Originals* of the *Cursitor*; and it is easy to judge what Sort of * *Originals* are made out (if

* The *Original Writ*, that is now supposed to issue out of the *Chancery*, to give this *Court* its Jurisdiction, is nothing more than a printed blank Form of the *Clausum fregit* itself, filled up by the *Cursitor*, with the Parties Names, returnable in the *Common Pleas*, and tested in the Name of the King, (without any Stamp, or ever passing under the Seal of the Court) and then filed with the *Custos Bre-vium*, in whose Office they lie to be consumed by Time,
un-

(if any are) from them. It is not pretended they are to warrant any *Judgment* in the Court, but only to give the Court its *Jurisdiction*; for if any *Original* is required to warrant a *Judgment*, on a Writ of Error brought, such *Original*, which used to be made out and filed at the Beginning of the Suit, is now bespoke after the *Judgment*, and is called a *Special Original*. By this we see, how Time works a Change in Things; for instead of *one Original*, as used to be, there are now two requisite, one to give the Court its *Jurisdiction* to proceed in the Cause, the other to warrant the *Judgment* of the Court in the same Cause. And instead of the first *Original* being to warrant the Declaration and the *Judgment*, as was the original Intent of it, the *Judgment* is now a *Warrant* for the *Original*!

Of the Defendant's Appearance.

With respect to the Defendant's *Appearance* in the Court of *King's Bench*, little need be said of it, further than, that when this Court began to take Cognizance of *Civil Pleas*, it was usual to arrest the Defendant on every Process of the Court, and bring him up into the *Custody of the Marshal* of the *Marshalsea*, in order to enforce him to appear to the *Bill* filed. If the Action was for any thing under 20*l.* they let

unless eaten by Vermin; for 'tis not pretended they are of any Use in the Suit, unless it must be, that the Court of *Common Pleas* shall have no Jurisdiction but from such *Originals*!

the Defendant *out of Custody* upon *Common Bail*; but if for 20 *l.* or above, they made him give *Special Bail*.

In Lord *Wentworth's* Time the 20 *l.* sunk to 10 *l.*

The *Common Bail*, it is presumed, always run thus :

M. ff. C. D. *is delivered to Bail upon the taking of his Body*, (that is to say) to John Doe and Richard Roe, *at the Suit of A. B.*

But after the 12 *Geo. 1.* the Form was altered to what it is now, *viz.*

M. ff. C. D. *having been served with Process, is delivered to Bail* (that is to say) to John Doe and Richard Roe, *at the Suit of A. B.*

But with regard to the Defendant's *Appearance* in the Court of *Common Pleas*, a great deal of Matter and Form depended on it; for formerly, every *Plaintiff* and *Defendant* was obliged to appear in his *proper Person* at the Return of the Writ, which *Appearance* was recorded by the *Filazer*, who * continued the *Processes* of the Court until the *Prothonotary* took it up on the Declaration. For,

On the Defendant's being *summoned*, he was to *appear*, or cast an *Essoin*; that is, send his

* It is from this, that now, when a Defendant is discharged by the Court *before* Declaration, the *Filazer* is the Officer to sign the *Superfedeas*; but *after* Declaration *Superfedeas's* are signed by the *Prothonotary*.

Excuse for his not appearing; and the Clerk of the *Essoins* entered such *Essoin*, and after such Entry the *Defendant* could not appear again that Term, because the *Plaintiff*, by the *Essoin* Roll, had the same Day given him; and therefore the *Defendant* was not allowed to appear and plead in the *Plaintiff's* Absence.

This *Essoin* was to be sent on the very * Day the Writ was returnable, for if the *Defendant* omitted casting an *Essoin* that Day, the *Plaintiff* had Liberty the next Day to enter an *Exception* with the Clerk of the *Essoins*, and obtain an Order that the *Defendant's* *Essoin* non recipiatur.

And therefore, as the *first* Day of the Term was called the *Essoin-day*, so the *second* was called the *Exception-day*; and the *third* Day was called the *Retorna Brevium* Day; for on this third Day the *Sheriff* returned the Writs into Court, and delivered them to the *Custos Brevium*; and then it was that the Court was seised of the Cause by the Possession of the Writ.

The fourth Day was called the *Appearance* Day, for on this Day both *Plaintiff* and *Defendant* were to appear; it was granted to the *Defendant* *ex Gratia* by the Court, and if the *Defendant* did appear, the Court proceeded *ore Tenus*, and *ex Officio* abated the Writ, or gave further Time for the *Plaintiff* to declare; but if the *Defendant* did not appear,

* *Essoins* were allowed on many other Occasions in the Court of *Common Pleas* especially in *Real Actions*, and even on the *Return* of the *Venire* &c. See *post*.

then

then the *Plaintiff* appeared and * *offered* himself, and the *Filazer* recorded his Appearance, and that the Sheriff had returned the Writ. And this he did to pray further Process of the Court, for if the Writ was returned by *Summoneri feci*, then the Court granted an *Attachment* and *Distress infinite in Debt*; but in *Trespafs*, because of the *Fine* to the King, the King's Process issued, which was a *Capias*, or a *Distringas*, as the Court thought proper. But if the Writ was returned by *Nil habet in Ballivâ meâ per quod Summoneri potest*, the *Capias* usually issued in both Cases. If the *Capias* was returned *Non est inventus*, the *Plaintiff* again *offered* himself, and then an *Alias Capias* issued; and upon *Non est inventus* thereon, the *Pluries*; after which they proceeded to Process of Outlawry. †

By *Magna Charta*, none are to be imprisoned *Nisi per Legale Judicium Parium suorum vel per Legem Terræ*. It was one Part of the Law of the Land to *commit* for *Contempts*, and it was confirmed by this Statute; and we may observe,

* The Form of the Entry in every Action for the *Plaintiff* in this Case was, "*Et præd' quer' obtulit se iiii Die, &c. et præd' Def. non venit; ideo Præceptum Vic. quod, &c.*" by which, *Obtulit se*, it was taken, that the *Plaintiff* was to appear in *proper Person*; for then no *Person* could make Attorney but by Patent, or the King's Writ: So the Writ commanded the *Defendant* *fer to appear, &c.* and that was taken to be in *proper Person*. See *Nat. Brew. Rast. &c.*

† The 25 *Ed. 3.* brought in the same Process in *Debt*, *Detinue*, and *Replevin*; and the 19 *H. 7.* in *Case*.

the above Processes, *i. e.* the *Capias*, *Alias*, and *Pluries*, were grounded on the Defendant's *Contempt* in not obeying the Summons, and *appearing* accordingly; and which issued to compel his Appearance, and not to imprison the Body for the *Debt* only.

If the Defendant * cast an *Essoin*, he had of course Time given him to the next Term. In some Cases the Defendant had *two* *Essoins* allowed him, until the Delays thereby grew so great an Hindrance to Justice, that in many Cases they were disallowed. See Stat. *West.* 2. and 12 *E.* 2. But it is difficult to shew when it became the Practice for the Sheriff, in order to take away *Essoins*, to return the *Original Writ* of Course by *Nil habet*, that the *Capias* might issue thereon, and the Defendant to be *arrested* without being first *summoned*: Though we can't observe the Inconveniences previous to it, yet we may judge of the Severities that ensued.

For, if the Defendant was taken by the *Capias*, *Alias*, or *Pluries*, the Sheriff was not obliged to take Bail for his Appearance, unless the Defendant sued out a Writ of † *Mainprize*,

* Before the Stat. of *Westminster* 2. c. 10. All *Attornies*, it is said, were made by Letters Patent under the Broad Seal, and these *Patents* were inrolled by the Clerk of the *Warrants*; but this Statute gives Liberty to all Persons of *appearing* by, and appointing an *Attorney*; and then the Clerk of the *Warrants* received each Person's *Warrant of Attorney*, after which *Essoins* were cast, and *Appearances* were by *Attornies*, and not *in Person* so frequently as used to be before.

† See *Natura Brev.* for this Writ.

because

because the Writ commanded him to take him, *so that he might have his Body, &c.* though he might take Bail for him of his own Accord. Therefore, by the 23 H. 6. c. 10. the Sheriff is obliged to take Bail, otherwise an Action lies against him; and the Plaintiff is at Liberty to take an *Assignment of the Bail Bond*, or, upon his Return of *Cepi Corpus*, amerce the Sheriff for not bringing in the Body.

From hence it is concluded, that after it became the Practice for the *Sheriff* to return the *Original* by *Nil habet* of course, every *Defendant* used to be arrested on the *Capias*, as on the *Bill of Middlesex*; and upon such *Arrest* was obliged to give *Bail* to the Sheriff to appear; or else (where the Action was for something of smaller Concern) send to an Attorney to undertake to appear for him; which was done, if the Sheriff thought proper to accept of it, by his *indorsing* on the Back of the Writ, or Warrant, such his *undertaking* to appear for the *Defendant*; and there are some Instances where Attornies have been fined, or ordered to pay Costs, &c. for refusing to appear according to his Undertaking.

If the Defendant was arrested for 20*l.* or above, the Plaintiff's Attorney, by entering a *Ne recipiatur* with the *Filazer*, did crave
* special Bail to the Action; for this *Ne recipiatur*

* The giving Bail to the Action came in on returning the *Capias* by *Cepi C. D. ejus Corpus, &c.* for before then, if the Defendant did not appear on the Summons, the Sheriff might attach him by his Goods,
or

cipiatur was, that no Warrant of Attorney, or Appearance should be received until *Bail* was filed with the Judge; and therefore it was irregular for the Defendant to *file* a Warrant of Attorney, before *Bail* was put in. And this Rule was taken from the Practice of the *King's Bench*, where they discharged no Person out of Custody, without special Bail, if the Debt was 20 *l.* But here, as well as in that Court, in Lord *Wentworth's* Time, it sunk down to 10 *l.*

The Hardship in this Case was, that the Defendant's *Bail* were obliged to travel to *Town*, live where they would, to put in *special Bail*; for the Judges were not impowered to appoint * *Commissioners* in the Country to take *Recognizances* of Bail until the 4th of *W. 3.* *M. c. 4.*

or by Pledges; if by his Goods, and he did not appear, they were forfeited; if by Pledges, and he did not appear, the Pledges were amerced. And this Bail, as Pledges are disused, supply their Place.

* The Commissioners appointed are *Justices of Peace*, or *Barristers* at Law, who reside in the Country, and are so few therein, that it *now* frequently happens, (especially where the Arrest is upon a short Return) that after a Man and his Bail have been riding from *Town* to *Town* after a Commissioner, to take the Recognizance, they can't meet with one, and are obliged at last to come to *London*, to put in Bail before a Judge, to prevent an Assignment of the Bail-bond; and what adds to this Mischief, is, that if *Bail* is put in in *Town*, such *Bail* must *justify* in *Town*; consequently a Man and his Bail may be kept a Week in *Town* from their Business; for, if they go down, they must come up again to *justify*. This is a Hardship that may be easily remedied.

But

But as it was become the general Practice, in both Courts, for a Man to be arrested upon a general Writ of *Capias Clausum fregit, Bill of Middlesex, Latitat, &c.* for 40s. and less, and even where, as in Trespas, nothing was due, and where only *Common Bail*, or a *Common Appearance* could be required, without ever expressing the Cause of Action, many litigious and vexatious Proceedings arose, and extraordinary Bail was exacted by the Sheriff's Officers, &c. as are complained of by the Statute. Therefore, to restrain these Abuses, the 13 Car. 2. was made, whereby the Sheriff is restrained from taking any greater Security than 40*l.* unless the true Cause of Action was expressed in the Writ. And this, as before observed, gave Rise to the inserting the *Ac etiam* in the Processes of each Court, thereby to set forth the Cause of Action; but yet, as no Proof was required to be made of the Debt, or Cause of Action, previous to the suing out the Writ, *Ac etiams* were nevertheless (where Ill-nature and Malice prevailed) inserted therein, and those litigious and vexatious Proceedings still continued, to the great Injury, Oppression, and Expence of the Defendant.

For when a Man was arrested on such a Process, and could not find *Bail* to the Sheriff, he had no Way left to obtain his Discharge, but by summoning the Plaintiff before a Judge, to shew his Cause of Action, which was generally done by the Plaintiff's swearing to his Debt; if not, the Defendant was discharged by the Judge's Order. But all this while the Defendant continued in Custody on the Arrest, and though the Defendant could give *Bail* to the Sheriff,

yet

yet Summons's were no less as frequently taken out, to *shew Cause why Common Bail, or a Common Appearance should not be accepted, to avoid putting in Bail to the Action.* Here was rare Work for the Attornies! It is more easy to conceive, than exprefs, the litigious and vexatious Mischiefs in the Practice, while these Proceedings continued; and yet it was not remedied until the 12 G. 1.

By this Statute the Plaintiff is obliged to make an *Affidavit* of his Debt or Cause of Action, and that the Sum due is 10 *l.* or upwards, *previous* to suing out the Procefs, to hold the Defendant to Bail; for if the Sum is not 10 *l.* the Defendant *is not* to be arrested, but is to be served with a Copy of the Procefs only, with an *English* Notice thereto, (for the Procefs still continued in * *Latin*) to shew the Intent of such Service. This was an excellent Law indeed! and worthy of being made perpetual! for it introduced a new and easy Method of summoning the Defendant to appear; and through this, as observed, the Common Bail-Piece was altered in it's Form.

As to the Defendant's *Appearance* in this Court, where special Bail was not required, it was made by a short Note of the Attorney, and is now thus :

* *William* the First brought in the *Norman* Language, but the Proceedings were recorded in *Latin*, being a dead Language, and not subject to Variation. The *French* continued till *Hill. 36 Ed. 3.* when it was abolished, though Notes were much longer continued to be taken in *French*; and Proceedings continued to be recorded in *Latin* until 4 *Geo. 2.*

B — . ff. *Appearance for C. D. late of W. in the said County, Yeoman, at the Suit of A. B.*
R. B.

Which is left with the *Filazer*, to be entered on his *Appearance Roll*; and in case the Defendant *fails* to file *Common Bail*, or enter such *Appearance*, on the Return of the Process, or in *eight Days* after, this Statute gives the Plaintiff Leave (upon an *Affidavit* made, and filed of the Service of the Process) to *appear* for him, and to leave a *Declaration* in the proper *Office*, and upon giving him Notice to *plead* thereto, (according to the Rules of the Court) to proceed to *Judgment*. And this is very reasonable, as in this Case the Defendant is in no Respect surprized in the Plaintiff's Process, but is, as we may say, * *twice* summoned to *appear*, and defend himself

* Our ancient Laws were much in Favour of Liberty, and though now a Man can't be arrested in the Courts of *Westminster* but for 10*l.* or above, yet it is questioned, if it would not be better if it was reduced to much less. This is spoke in Favour of Trade; for was a Man under no Fear of Restraint, it would put a Stop to Credit; and was the Arrest to be for a less Sum, the Plaintiff (on whom the Hardship lies, to be forced to take any Remedy for a just Debt) would be in a fairer Way of getting his Money.

A Man can sooner pay 5 or 6*l.* than 10*l.* and it was for this Reason, that about *London*, a Plaintiff had Recourse to the Palace Court; which Court for *twelve Miles* round *London*, and also the City Courts for *London*, held to Bail for *forty Shillings*, and above; but now by an Act passed in the 19th Year of his present Majesty, it is enacted, that after the 1st of *July*, 1779, no Person shall be arrested or held To Bail upon Process issuing out of any inferior Court for less than 10*l.* so that now a Man can't be arrested for less than 10*l.* and in some Counties not under 20*l.* and in such a Case, how can it be expected, if the Defendant can't pay his Debt upon the Arrest, he can discharge him-
self

himself against the Plaintiff's Suit, that is once by the Service of the Writ, and next by the Notice

self from Gaol with the Addition of Costs? Whereas, had the Arrest been for 4 or 5 *l.* only, a Defendant might have raised it, or got Friends, much sooner, to relieve him.

But now, as the Arrest is for 10 *l.* a Plaintiff is very unwilling the Defendant should be discharged; and, to punish him, still proceeds to prevent it, and thereby increases the Hardship on both; for the Plaintiff's Revenge is sharpened by reason of his Costs, and the same Costs is an Addition to the Defendant's Debt, and thereby his Discharge is rendered still more difficult; for these Costs, upon a Writ of Inquiry, may be 7 *l.* or 8 *l.* at the least; and 14 *l.* or 15 *l.* if by Verdict on a Trial: generally they are much more,

The not holding a Man to Bail for *less* than 10 *l.* and that by *Oath* of the Plaintiff, was designed to favour a Man's Liberty; now suppose a Man is *served* with a *Copy* of a Writ, for a just Debt of 4 *l.* or 5 *l.* only, the only Check upon the Defendant for the Non-payment is the growing Costs; and what is then the Consequence, with respect to both Parties? The Plaintiff must proceed to Judgment by Inquiry, or Verdict, to prevent his being non-pros'd, and add such large Costs to his Debt, before he can receive any Benefit by his Suit, that are sufficient to deter any Plaintiff from suing at all, where the Payment is the least doubtful; and 'tis evident an experienced Tradesman will rather lose such a Debt, than risque a certain great Expence in endeavouring to get it. This is an Occasion for a Defendant to exult, and run in Debt wherever he can get Credit; and as to the Defendant, those Costs are such an Addition to a small Debt, that it is impossible to expect a Man, who can't pay 4 *l.* or 5 *l.* should pay 15 *l.* or 20 *l.* and if not, his Body, Goods, and Chattels, must be, and continue to be, liable to be taken in Execution, to the immediate Ruin of himself and Family, and remain a Discouragement to his future Endeavours, for these are large

F

Costs

Notice of a Declaration being left in the Office; and without this Liberty given to the Plaintiff thus to proceed, he would be in no Capacity of receiving any Benefit by his Suit, nor the Court of giving any Judgment or Relief to him therein.

However, it may be observed, that this, and many other Methods of the present Practice, are quite opposite and contradictory to the old, established, and fundamental Laws and Customs of the Courts, in many Instances, as may be observed throughout. (See

Costs for a poor Man to pay. However, the industrious Creditor is the greatest Sufferer; his Debt is most often lost, and his Costs are a certain Addition to it; and it is difficult to point out a Method to save or prevent it; unless a Plaintiff, by establishing a small Debt by Oath, might arrest a Defendant, and after some short Time of Imprisonment, if the Debt was not paid, the Defendant should be released both from Gaol and the Debt. Such Punishment, when rendered certain, and proportioned to the Debt, might deter the wild, the careless, and dishonest Part of Mankind, from contracting Debts but with an Intent to pay them. Then the Plaintiff would know his Loss, and be at Liberty, not to add such extraordinary Costs to it, as he now must. It need be no Bar to a Man's giving Bail, and contesting the Suit; and it would prevent such long Imprisonments, for small Sums, that poor Prisoners labour under. It would prevent a whole Family's being ruined (as is often the Case) by an Execution against the Goods, &c. It is difficult to say what, but some such Method might be substituted to save the Plaintiff's Expence in proceeding, who in general is the Sufferer, and the long Imprisonments poor Men most frequently endure, &c.

post.)

post.) However it is an excellent Law, and shews how much the Proceedings, or Pleadings in a Suit, want to be regulated, and made agreeable to the present Mode of Practice, without harbouring so much Obscurity, and unintelligible References to ancient Matters as they do.

After the Defendant has appeared to the Plaintiff's Process, or in case the Plaintiff appears for him, according to the above new established Method of Practice, the next regular Proceeding in a Suit is the Plaintiff's *Count*, or *Declaration*, exhibiting his *Complaint* or *Cause of Action*; which used, and is now *supposed*, to be done by the *Bill* or *Original Writ*, filed in the respective Courts; though, in fact, neither the one nor the other is but very rarely or ever done, except, as observed, against Prisoners, &c. neither of them being *now* requisite at the Commencement of a Suit, they being helped by the Statute. And therefore they may, with great Reason, be laid aside; especially, as by what has been said, and as it will evidently appear, they only (when now occasionally used) tend to the increasing the Expence of the Suit, and multiplying the Proceedings, without the least Necessity for them.

Of the Declaration.

A *Declaration**, or *Count*, is an Instrument framed to set forth the Complaint or Demand of the Plaintiff or † Demandant, against the Defendant or † Tenant; and which used, and ought to contain, the whole Matter or Substance thereof.

The original Design, and principal Establishment of the Court of *King's Bench*, after the making of *Magna Charta*, being to determine criminal Proceedings, it is said, *Civil Causes* were the *By-busines* of this Court, and entered by way of *Memorandums*; from which it may be concluded, that the *Declaration* was begun with the same *Memorandum*, which is now prefixed before the *Issue*, (see *post*.) it seems to have been so. But to begin on this Head with more Certainty:

In the Court of *King's Bench*, the *Declaration* used to be drawn from the Bill then filed by the *Clerks* in the *King's Bench* Office, who were

* Though a *Declaration* and *Count* may be sometimes confounded, yet a *Count* more properly signifies the *Declaration* in the *Original Process*, and chiefly used in *Real Actions* in the *Common Pleas*; it seems to come from the *French* Word *Counter*, or *Centor*, to declare: So *Serjeants at Law* have been called *Counters*, or *Contours*; and at this Day we call their passing a *Recovery* at Bar, *Counting* at Bar.

† *Demandant* and *Tenant* were Terms used in *Real Actions* only, in the *Common Pleas*, and are disused with them.

then

then many, and did the Business therein for the Attornies at large, or for those who had not Seats there; in like Manner as the *Clerks* in the *Exchequer* of Pleas do now, for these *Clerks*, in Right of their being *Clerks* in the Office, were called *Attornies of the Court*; and no *Attornies at large*, till after the Fire of *London*, were admitted to file their own Pleadings; and it was from those *Clerks* that the Clerk of the Declarations received his Fee of 2 s. a Term for * *pyeing*, *filing*, and *keeping* the Declarations; and 'tis supposed they paid him as well for the *Attornies* at large who employed them as for themselves.

The Bill or *Declaration* being † ingrossed and filed by the Plaintiff's Clerk, (which was done for the entering up Continuances thereon) he then delivered a Copy of it to the Defendant's Clerk, who filed the Common Bail, who taking a Copy of it for his own and Client's Use, returned it again the next Term when he came to plead, with his Plea (if he pleaded the general Issue) wrote on the Side of it, (or

* This word *pyeing*, as made use of in an old Rule of Court, signifies the selecting the Declarations from that confused Manner in which they were brought in, and reducing them into an alphabetical Order, for the more ready finding them, &c. It is a Term yet in Use among the Printers, but here it signifies the Reverse of this, for they call *pyeing* the casting away the Letters out of the Frame, or Box, confusedly together; and this they call making *Pye*.

† *Ingrossing*, *filing* and *continuing*, have been long disused; but it is yet charged for, as done previous to the delivering, or filing the Declaration.

else entered his Plea in the general Issue Book in the same Office) which was called giving a Plea on the Book-side. And in the Books of our present Practice it is laid down as a Rule, *that the Plaintiff's Clerk, or Attorney, may make up the Issue, or Paper-book, in all Cases where the Plea may be given on the Book-side, without saying what such Pleas are which may be so given, it being to be understood to be the general Issue; for if the Defendant pleaded any special Plea, he filed it with the Clerk of the Papers in the same Office, for the Plaintiff's Clerk to bespeak a Copy of it; and then the Clerk of the Papers had a Right to make up the Paper-book or Issue from the Pleadings of the Parties, which Privilege they still retain in this Court; and in this Office the Clerk of the Bails, the Clerk of the Rules, and other Officers of the Court had their Seats, and therein all Business was transacted by these Clerks from their Clients Instructions.*

In the *Common Pleas* the Business, originally, was from Time to Time heard *Ore tenus* at the Bar, and the Prothonotaries were then the Scribes who took down the Acts of the Court. They began to take up the Cause from the Return of the Writ, therefore, upon the Plaintiff's declaring, they set forth the Authority by which the Court proceeded, that it might appear that the Court had Cognizance of the Cause. Wherefore, in all Actions where the first Process was by Summons, they took Notice of the Summons, and said, *C. D. * Sum-*

* It has been observed before, what gave Rise to this Difference in the Prothonotary's Entries, *p.*

monitus fuit ad respondendum, &c. And so in Trespafs, &c. where the Procefs was by Attachment, they said, *C. D. Attachiatus fuit ad respondendum, &c.*

As the Plaintiff declared *Ore tenus*, which was minuted down by the Prothonotary, who afterwards entered the Declaration in Form, agreeable to the Writ on the Roll: So was likewise the Prayer to *imparle*, this being all that was done the first Term by the Court, after the Parties had appeared; and then the Roll was called the *Imparlance Roll*; and afterwards, when a *Plea* was given to enter, they made the *Entry* on another Roll called the *Plea Roll*, and from thence they transcribed the *Nisi prius Roll*, on the *Back* of which the Judgment was entered. But as the Business of the Court increased, the Prothonotaries found it difficult to manage the Business of the Court, in making those Entries; and therefore they permitted Attornies to draw up the Pleadings, and leave them in their Office to enter occasionally; and afterwards to deliver the Proceedings in Paper to one another, and to pay them for the several Entries on passing the * *Nisi prius Roll*; [the Practice of the *King's Bench* is supposed to have introduced this in the *Common Pleas*]. And from these Pleadings in Paper, or in the Office, the *Nisi prius*

* The Prothonotaries in the *Common Pleas* (and Clerk of *Nisi prius* in the *King's Bench*) do pass all *Records*, or *Nisi prius Rolls*, for Trial, and are paid so much *per Sheet* for so doing, because the *Nisi prius Rolls* are supposed to be made up by themselves, from the several Rolls in their Offices, &c.

Roll was made up; and *after the Verdict*, they made up the *Plea Roll* from the *Nisi prius Roll*, in order to enter up the Judgment thereon. This was inverting the ancient Practice, for now the Proceedings begun to run in a new Channel.

Attornies, having gained Knowledge and Skill from the Entries of the Prothonotaries, in common Cases drew their own *Declarations*, or else used to apply to Counsel to do it; or, it might be rather said, that in difficult Cases, while the *Original* was in Use, the Counsel drew or settled the *Præcipe* for the *Original*, for that in Trespass, Case, &c. was a Guide for the *Declaration*; for in the *Common Pleas* (and also in the *King's Bench*, when the Proceedings were by *Original*) the whole *original Writ* used to be inserted in the *Declaration*, as introductory to the subsequent Part which was a little more full; and so the *Original* containing the whole Substance of the Complaint or Demand, it was no more than reducing the *Writ* into the Form of a *Declaration*, by repeating the same Matter, as contained in the *Original*, over again; with sometimes a little more Certainty as to Time, Place, &c. and for which Reason the Declaration has been most properly said to be, *An Exposition of the original Writ, adding Time, Place, and other necessary Circumstances to it, to render it certain, that the same might be triable*. It being a strictly observed Rule, that there should be no Variance between the *original Writ* and the *Declaration*, but that the one should be a Warrant for the other; for, if there was any Variance, the Defendant might plead it in Abatement.

And

And this Method of repeating the *Original* is still often (and as it is conceived unwarrantably) used in *Qui tam Actions* in this Court. In order to explain this clearly, and thereby to elucidate the present formal Beginning of the *Declaration* in the *Common Pleas*, it will be necessary to recite some Part of the *Original* again. Suppose the Writ run thus:

CHARLES, &c. *To the Sheriff of B. Greeting. If A. B. make you secure to prosecute his Claim, then put C. D. late of W. in your County, Yeoman, by sure and safe Pledges, that he be before our Justices at Westminster in eight Day of St. Hilary, to answer to the said A. in a Plea, that whereas the said C. on the tenth Day of November in the second Year of our Reign, at W. in the said County, was indebted to the said A. in the Sum of 20 l. of good and Lawful Money of England, for divers Goods, &c. (so on with the whole Complaint, or Demand, concluding) to the Damage of the said A. 40 l. as it is said; and have you there the Names of the Pledges, and this Writ. Witness Ourself at Westminster, &c.*

Now in drawing the Declaration, they begun thus:

B——. ff. C. D. late of W. in the said County, Yeoman, was attached to answer to A. B. in a Plea, that whereas the said C. (here came in a Recital of the Complaint as in the *Original*) on the 10th day of November in the
second

An Historical Treatise of a Suit at Law.

*second Year of the Reign, &c. at W. in the said County, was indebted to the said A. in the Sum of 20 l. of lawful Money, &c. down to to the Damage of the said A. 40 l. Instead thereof they went on, and continued it thus: And whereupon the said A. by R. B. his Attorney, complains, that whereas the said C. on the said 10th Day of November in the said second Year of the Reign &c. at W. aforesaid, in the County aforesaid, was indebted to the said A. in the said Sum of 20 l. of good and lawful Money of E. for divers Goods, Wares, &c. (and so on with the very same Complaint over again, concluding the Declaration with) to the Damage of the said A, forty Pounds; and thereupon he brings his Suit *, &c.*

* *And therefore he brings his Suit, &c. which is an Offering to verify by Witnesses the Cause of Complaint; but against an Attorney, that Form was never in Use, but it was by way of Petition to the Court, and therefore he prays Relief, &c. because Attornies and Officers of the Court were privileged Persons. This, &c. is made by a modern Writer to supply these Words, "And hath good Proof of the Premises, when the Court will consider thereof." And it is very probable some such Words were anciently used, seeing they are properly answered by the Quando, &c. in the Plea, viz. "When and where the Court will consider thereof" which is now supplied by when, &c. for if some such Words were not to be understood, the &c. in each is superfluous; but we find by our oldest books and records, that *Et inde producit se* &c. and *Quando, &c.* have been always used for a formal Conclusion of the Declaration and Plea.*

But

But this, at length, was thought a very great Grievance to the Subject, so very unnecessarily to *double the Declaration*; and therefore, by the Rule in the Time of *Charles II.* made for settling and regulating a Course of Practice and Pleadings, (a Thing which may be thought wanting at present) it was ordered, for avoiding long and unnecessary Repetitions of the *original Writ*, in Actions upon the Case, and personal Actions, penal Statutes, &c. *that Declarations in Actions of Trespafs, upon any general Statute, &c. other than Debt, should not repeat the Original, but only the Nature of the Action.* This brought the Declaration to the present Form, viz.

B——. ff. C. D. late of W. in the said County, Yeoman, was attached to answer to A. B. in a Plea of Trespafs on the Case, &c. and whereupon the said A. B. by B. R. his Attorney, complains that whereas the said C. on the 10th Day of November in the second Year of the Reign —— was indebted to the said A. in the Sum of ——

The whole Recital of the *Original* being supplied by that, &c. and therefore that, &c. in the Common Pleas here, ought not to be omitted in the *Declaration*, it being at present, a necessary Part of the Pleading; for as it supplies the *Original*, so it also supplies the Return thereof, and is the Reason why no *Pledges* are added at the End of the *Declaration*, as is used in the *King's Bench*, when the Proceedings there are by *Bill*, and not by *Original*. Before this Rule, there was, as before observed, a Necessity for an *Original* to be sued

sued out at the Commencement of the Suit, which was a *Guide* for drawing the *Declaration* by, so that they might agree; but afterwards, as the *Original* was not to be repeated, there could be no Occasion for one, for that or any other Purpose; consequently, it must be supposed, that soon after this Rule the suing out *Originals* began to be omitted.

Notwithstanding this Rule, the Recital of the *Original* is generally used in *Qui tams*, and pretty fully in Actions of *Trespass* in this Court, wherein it may be as well omitted, as it is in *Case*. The Declarations themselves will clearly shew this.

Now in the *King's Bench* by *Bill*, they were not confined so strictly in drawing the Declaration, as a Fault therein was not attended with such an Expence to the Client to amend it, as it might be amended by the *Bill* upon the File; and in case there was any Fault discovered in the *Bill*, that might be amended, so as to warrant the Declaration. But a Fault in the Declaration in the *Common Pleas* often put the Plaintiff to the Expence of purchasing a new *Original*; for the Declaration being grounded on the *Original*, they were to agree together; and in case any Fault was discovered in the *Original* itself, it could not be helped but by the Purchasing, *i. e.* praying for, suing out, and returning a new original Writ. However, as in the *King's Bench* the Defendant was supposed to be in the Custody of the Marshal of the *King's Marshalsea*, they always begun the Declaration with Relation to the *Bill* filed, or supposed to be filed, in this Manner, *viz.*

B——. ff. A. B. complains of C. D. being in
the * Custody of the Marshal of the Marshalsea

* Until lately, one could not declare against a Defendant in the *King's Bench*, who was neither in the Custody of the *Marshal*, or who had not filed his Bail; for no otherwise could the Defendant be said to be in Court; and consequently the Court had no Cognizance of any Matter against him. And therefore, if a Defendant was in Custody of a *Sheriff*, in a County Gaol, upon the Process of this Court, the Plaintiff was obliged, first to bring him up by *Habeas Corpus*, and turn him over to the *Marshal*, in order to declare against him. And this seems to be the strongest Evidence that can be, that anciently, every Defendant in this Court was to be really in the Custody of the *Marshal*, before any Proceedings could be had; or this Court could take Cognizance against him on any Civil Matter; for this was the Ground-work of the Court's Proceeding. But by the 4 & 5 W. & M. c. 21. Leave is given to the Plaintiff to declare against a Defendant in the Custody of the *Sheriff* or *Bailiff*, as effectually as if in Custody of the *Marshal*, so that the Declaration sets forth in whose Custody the Defendant is. Observe then, if the Ground-work is not, by this Statute, quite subverted; if not by this Statute, how is it when a Defendant is not in Custody at all, nor has entered any Bail, as is the Case, when a Defendant is served with a Copy of a Process only, and the Declaration is left in the Office, and yet he must be declared against as in Custody of the *Marshal*? It need not be further observed, how much the present Practice deviates from the true Reason of declaring against a Man as in Custody of the *Marshal*; but seeing it runs counter to Truth, and the very Nature and Reason of the Court's proceeding in a Cause, why should this antiquated Custom be continued?

of

An Historical Treatise of a Suit at Law.

of our Lord the King, before the King himself, for this, to wit, that whereas the said C. on the 10th Day of November, &c. was indebted to the said A. in the Sum of, &c. (adding Pledges at the End thereof, viz.)
 * Pledges to prosecute, John Doe and Richard Roe.

By this it will appear that the Relation the Declaration has to the *Original* in the *Common Pleas*, and the Relation it has to the *Bill* filed, or supposed to be filed, in the *King's Bench*, is the Reason of the Difference, in *Form*, of the *Declarations* between the two Courts; for, was it not for the *Original*, and it's supposed Return of *Pledges* in the *Common Pleas*, there would be no Occasion for that, &c. at the Beginning of the *Declaration* there, to supply the

* Can any good Reason be assigned, why *Pledges* are used in the *King's Bench* (and also in the *Common Pleas*) when it is against *Attornies* or *Officers* of the Court there, and not by *Original*? Did ever any Process issue here requiring *Pledges*? And yet these are continued with much Exactness, and are the Support of the *Memorandum* at the Beginning of the *Issue*. And the formal and feigned *Pledges* were thought so material, before the 4 & 5 *Annæ*, that the Want thereof was a Matter of *Demurrer*. And since then, if by Chance they have been omitted, Summons's have been, and may be taken out, for the Plaintiff to shew Cause why he should not amend his *Declaration*, by adding them. A fine Amendment truly! which a litigious Defendant seldom omits to avail himself of, when he wants to protract or delay a Suit, and it shews the Mischiefs that may arise through the Use of *Pledges*.

Original

Original and Return. And was it not for the formal supposing the Defendant to be in *Custody* of the Marshal, in the *King's Bench*, there would be no Occasion for such a *fictitious* Beginning, nor for adding *Pledges* at the End of the *Declaration*, nor consequently for the *Memorandum* at the Beginning of the Issue, in the *King's Bench*; but the Declaration might be more plain, simple, and significant in one and the like Form in both Courts, wherein the Defendant's Addition, and the Nature of the Action, should appear, *viz.*

B — to wit. A. B. by R. B. his Attorney, complains of C. D. late of W. in the said County of B. Yeoman, of a Plea of
for that whereas the said C. on the 10th Day of November in the Year of our Lord 1762, at W. in the said County, was indebted to the said A. in, &c. And therefore he brings his Suit, &c.

The Court such Declaration is in, would appear by the *Chief Clerk's*, or the respective *Prothonotary's* Name at the Top of it.

There are some Particulars taken Notice of by our Books, wherein a Declaration in one Court differs from that in the other; but unless it be in the formal Beginning of each, it is presumed these Differences are very immaterial: as whether an *Alias Dist'* be in or not, or a *Profert* in *Cur'* in the *Body*, or at the End of the *Declaration*; and so of *Letters Testamentary*, &c. or whether it be in the *Year* of our Lord, or in the *Year* of the *Reign* of the King, seeing all these are almost now used indifferently.

Formerly;

Formerly, indeed, when *Originals* were sued out as the leading *Procesſes*, then if an *Alias Diſt'*, or Year of the Reign, &c. was in the *Writ*, it was neceſſary the ſame ſhould be in the *Declaration*, to agree with it. So likewiſe in Reference to the ancient Practice in the *Common Pleas* in *Debt*, *Covenant*, *Account*, *Annuity*, *Detinue*, and *Replevin*, wherein the Defendant was uſed to be ſummoned on the *Original*, the Declaration ſaid, *Summonitus fuit ad reſpondendum*, &c. And in *Treſpaſs*, *Caſe*, *Trover*, and *Ejeſtment*, wherein *Attachments* were uſed, it ſaid, *Attachiatus fuit ad reſpondendum*, &c. And ſo, even at this Day, theſe formal Words ſtill continue in Uſe in the *Common Pleas*, notwithstanding the Practice to which they relate has been diſcontinued ſome hundred Years. What religious Obſervers of Antiquity have the Practiſers of the Law been, in all Things that were not abſolutely forbidden them!

But the better to obſerve the Difference, let us peruſe a few Forms of Declarations in each Court in *Debt*, *Caſe*, and *Treſpaſs*, as they are at preſent in uſe.

Declarations.

The common formal Beginning of a Declaration in the King's Bench.

Berkſhire, to wit. A. B. complains of C. D.
being in the * *Cuſtody of the Maſhal of the*

* The Defendant being alledged to be in the *Cuſtody of the Maſhal*, there was no Occaſion for any further Addition to his Name; and this is the Reason why it is omitted in the *King's Bench*.

Marshallsea of our Lord the King, before the King himself, for this, to wit, that whereas the said C. &c. and ends with

Pledges to prosecute, { John Doe
and
Richard Roe.

The common formal Beginning of a Declaration in the Common Pleas, in Case, Trespass, Trover, and Ejectment.

Berkshire, to wit. C. D. late of W. in the said County * of B. Yeoman, was attached to answer to A. B. of a Plea of Trespass on the † Case, &c. and whereupon the said A. B. by R. B. his Attorney, complains, that whereas the said C. on the, &c. without adding any Pledges.

N. B. If the Action be in Debt, Detinue, Covenant, Account, Annuity, or Replevin, then it must be, Was summoned to answer.

* By the Court of Common Pleas the County in the Margin is Part of the Declaration, though not held so in B. R. and this of B. may therefore be omitted, as 'tis superfluous.

† This &c. is necessary, and ought not to be omitted, because it supplies the Recital of the Original and Return of Pledges; and the Reason why there is no &c. here in Debt, Trespass, &c. is, because in these you see, the Original is in Part recited, notwithstanding the R. in Cha. 2.

A Declaration in Debt on Bond in the King's Bench.

Berkshire, to wit, A. B. complains of C. D.
*being in the Custody of the Marshal of the
 Marshalsea of our Lord the King, before the
 King himself, * of a Plea that he render to
 the said A. 100l. of lawful Money of Great
 Britain, which he owes to and unjustly detains
 from him, for this, to wit, that whereas the
 said C. on the 10th Day of May in the Year
 of our Lord 1730, at W. in the said County,
 by his certain Writing Obligatory, sealed with
 the Seal of the said C. and to the Court of
 our said Lord the King, now here shewn †,*
the

Date.

Profert.

* When the King's Bench took Cognizance of Debt by Original, they pursued the Form of the Common Pleas in the Declaration in this Place; for it is plain, this is a Recital of the Original Writ, as in the Common Pleas, and can no ways here relate to any Process out of the King's Bench, and therefore these Words, *Of a Plea that he render, &c.* should (as is conceived) be omitted in the Declarations in Debt in B. R. when the Proceedings are not by Original, as generally they are not.

† The Reason why a Deed that is pleaded ought to be shewn to the Court, is, because every Deed must prove itself to have sufficient Words, whereof the Court must adjudge; and it is also to be proved otherways, as by Witnesses, or other Proof, if the Deed be denied, for that is Matter of Fact. 1 *Inst.* 121. b.

Of every Deed pleaded, with a *Profert hic in Cur'*, the other Party is intitled to crave Oyer, i. e. to hear it;

the Date whereof is the same Day and Year above, acknowledged himself to be bound to the said A. in the said 100 l. to be paid to the said A. whenever he the said C. should be thereunto required. Yet the said C. although often required, &c. hath not paid to the said A. the said 100 l. but hath hitherto refused, and still doth refuse to pay the same to him, to the Damage of the said A. 20 l. and therefore he brings his Suit, &c.

R. B. for the Plaintiff.	{ Pledges to prosecute }	J. Doe	Pledges.
B. R. for the Defendant.		and R. Roe.	

A Declaration in Debt on Bond in the Common Pleas.

Berkshire, to wit. C. D. late of W. in the said County, Yeoman, was summoned to answer to A. B. of a Plea, that he * render to him
100 l.

it; which is now generally given by making a Copy of such Deed for him. Oyer is an old French Word, and was anciently used for what we now call *Affixes*, Anno 13 E. 1. And the Justices Commission, a Commission of *Oyer et Terminer*; though anciently every Deed that was pleaded was actually brought into Court, and could not be taken out again till after the Matter was determined.

* This is a Recital of Part of the Original with an &c. to supply the Remainder of it, with the Return thereof. The same is in the Declaration on a *Mutuuatus*, and others in *Debt*. And though this formal Part is copied from the *Common Pleas* by the
G 2 King's

An Historical Treatise of a Suit at Law.

100l. which he owes to, and unjustly detains from him, &c. and whereupon the said A. by R. B. his Attorney, complains, that whereas the said C. on the 10th Day of May in the Year of our Lord 1730, at W. in the said County, by his certain Writing Obligatory, acknowledged himself to be bound to the said A. in the said 100l. to be paid to the said A. whenever he the said C. should be thereunto required; Yet the said C. although often required, &c. hath not paid to the said A. the said 100l. but hath hitherto refused, and still doth refuse to pay him the same, to the Damage of the said A. 20l. and therefore he brings his Suit, &c. And the said A. brings here into Court the aforesaid Writing Obligatory, which testifies the said Debt in Form aforesaid, the Date whereof is the same Day and Year above mentioned.

N. B. The most material Difference in these is in the formal Beginning of them, else they may be used indifferently for either Court, it being not material whether the *Profert in Cur'* be in the Middle or End of the Declaration; though it is presumed this in the *Common Pleas*

King's Bench, yet it ought to be without the &c. there being nothing in the *King's Bench* to be supplied by the &c. therefore this Part of the Declaration therein had been best omitted. And the Declaration thus, A. B. complains of C. D. being in the Custody of the Marshal of the Marshalsea of our Lord the King, before the King himself, for this, to wit, that whereas, &c. without any, of a Plea that he render, &c. either in Debt, or on a *Mutatus*,

is

is the most ancient Form. Letters Testametary, &c. are always at the End in both Courts, because the *Profert in Cur'* of these cannot well be introduced in the Body of the Declaration.

**In Debt on Bond, with an Alias Dict.
in the King's Bench.**

Berkshire, to wit. A. B. complains of C. D. otherwise called C. D. of W. in the County of B. Yeoman, being in the Custody, &c.

In the Common Pleas.

Berkshire, to wit, C. D. late of W. in the said County, Yeoman, otherwise called C. D. of W. in the County of Berks, Yeoman, was summoned to answer to A. B. of a Plea, that &c.

If an *Alias Dict'* is used, it ought to be *Literatim*, as in the Bond. An *Alias dict'* was never necessary in the *King's Bench*, and however necessary it might have been formerly in the *Common Pleas* to agree with the Original, it is not so now, but is thought to be best omitted, to avoid the Risque of making a Mistake therein.

**A Declaration on a Mutuatus in the
King's Bench.**

Berkshire, to wit. A. B. complains of C. D. being in the Custody of the Marshal of the

An Historical Treatise of a Suit at Law.

Marshalsea of our Lord the King, before the King himself "of a Plea, that he render to the said A. 50l. of lawful Money of Great Britain, which the said C. owes to, and unjustly detains from him," for this, to wit, that whereas the said C. on the 10th Day of May in the Year of our Lord, 1730, at W. in the said County of B. borrowed of the said A. the said sum of 50l. to be paid to the said A. whenever he the said C. should be thereunto afterwards required; yet the said C. although, &c. The Breach and Pledges as before.

On a Mutuatus in the Common Pleas.

Berkshire, to wit, C. D. late of W. in the said County, Gentleman, was summoned to answer to A. B. of a Plea that he render to the said A. 50l. of lawful Money of Great Britain, which he owes to, and unjustly detains from him, &c. and whereupon the said A. by R. B. his Attorney complains, that whereas the said C. on the 10th Day of May in the Year of our Lord, &c. The same as above, without Pledges.

A Declaration in Case in the King's Bench.

Berkshire, to wit, A. B. complains of C. D. being in Custody of the Marshal of the Marshalsea of our Lord the King, before the King himself, for this, to wit, that whereas the said C. on the Day of in the

2

the

the Year of our Lord 1740, at W. in the said County of B. was indebted to the said A. in the Sum of 30l. of lawful Money of Great Britain, for divers Goods, Wares, and Merchandizes, &c. Or for Money lent, Work done, &c.

In Case in the Common Pleas.

Berkshire, to wit. C. D. late of W. in the said County, Apothecary, was attached to answer to A. B. of a Plea of Trespass on the Case, &c. and whereupon the said A. by R. B. his Attorney complains, that whereas the said C. on the Day of in the Year of our Lord 1740, at W. in the said County of B. was indebted to the said A. in the Sum of 30l. of lawful Money of Great Britain, for divers Goods, &c.

Declarations in *Case* differ only in the formal Beginning of them, and adding *Pledges* in the *King's Bench*, and omitting them in the *Common Pleas*. And in this only, in the *Common Pleas*, is truly expressed the Nature of the *Action*, viz. *Trespass on the Case*; whereas in the others it is set forth in the whole Substance of the Declaration.

A Declaration in Trespass in the King's Bench.

Berkshire, to wit. A. B. complains of C. D. being in the Custody of the Marshal of the
G 4 *Marshalsea*

An Historical Treatise of a Suit at Law.

Marshalsea of our Lord the King, before the King himself, for this, to wit, that whereas the said C. on the Day of in the second Year of the Reign of our Sovereign Lord George the Third, now King of Great Britain, &c. at W. in the County of B. with Force and Arms, to wit, with Swords, Staves, Knives, Fists, and Feet, made an Assault upon the said A. and beat, wounded, and ill-treated him, so that his Life was despaired of, and then and there other Injuries to him did, against the Peace of our said Lord the now King, to the great Damage of the said A. of 100 l. and therefore he brings his Suit, &c.

Pledges, &c.

In Trespass in the Common Pleas.

Berkshire, to wit. C. D. late of W. in the said County, Yeoman, was attached to answer to A. B. of a Plea, wherefore with Force and Arms he made an Assault upon him the said A. at D. in the said County of B. and beat, wounded, and ill-treated him, so that his Life was greatly despaired of, and then and there other Injuries to him did, against the Peace of our said Lord the now King, &c. and whereupon the said A. by R. B. his Attorney, complains, that whereas the said C. on the Day of in the second Year of the Reign of our Sovereign Lord George the Third, now King of Great Britain, &c. at D. in the said County of B. with Force and Arms, to wit, with Sword, Staves, Knives, Fists and Feet,

Feet, made an Assault upon the said A. and beat, wounded and ill treated him, so that his Life was despaired of, and then and there other Injuries to him did, against the Peace, &c. to the Damage of the said A. 100l. and therefore he brings his Suit, &c.

These few Sketches of Precedents are only to shew the Agreement there is between the *Declarations* of both *Courts*, and wherein they differ from each other; which, as observed, is only in the formal * *Beginnings*, and is owing to the Reference they have to the *Bill*, and the *Original* in the respective *Courts*, though in some in the *Common Pleas*, especially those in *Trespasses*, we find the *Original* more fully set forth than in the others. And now, in *Quintum Actions*, the *Original* is generally all repeated, notwithstanding the Rule of *Car. 2.* to restrain the Repetition thereof.

Before we depart from this Head, there are yet two Things to be taken Notice of, that is, the *Venue*, and the *Day* of the *Action*.

With respect to the *Venue*, it is said, that on the settling of *Nisi prius*, they obliged the Plaintiff to try his *Action* where it accrued, because the *Jury* was to come from where the *Fact* was committed. But while the Process was by *Attachment* and *Distress*, which could

* As to the formal *Beginnings* and *Conclusions* of *Declarations* in particular Cases, as *for* and *against* *Executors* or *Administrators*, *Assignees* of a *Bankrupt*, *Attornies*, &c. they are to be seen in the printed Books of *Precedents*.

be only where the Defendant's Goods were, it begat a Distinction between Actions; the one being called *Transitory*, which related to *Goods* and *Chattels*, and was to follow the Defendant wherever he could be found; the other was called *Local*, because it related to *Lands*, and the Process was to be on the *Lands*. *These* were to be laid in the County where the *Lands* lay; but in *Transitory Actions* the Plaintiff had Liberty to chuse his *Venue*, being supposed to lay it where the Action accrued; and in case Defendant fled from that Place, the Plaintiff had Liberty to try his Action in the County wherein the Defendant was *summoned*. But this came at length to be much abused, for the Plaintiff would lay his *Action* far from the *Place* where the *Action* arose, which put the Defendant under a Necessity of carrying his Witnesses into a County far from the *Place*. In order to prevent this, the 6 R. 2. was made, which enacts that Writs of *Account*, *Debts*, &c. should be commenced in the County where the *Contracts* were made; for if the *Contracts* were made in another County than contained in the *Original*, the Writ should abate. But this *Statute* (it is said) was never put in use, for it was thought the Plaintiff could not then follow the Defendant into another County, and it was foreseen that many other Mischiefs would arise; therefore the Judges assumed a Power of changing the *Venue*. The Alteration began in the *King's Bench*, for there, where the Process was by *Bill*, they could easily change the *Venue*; but in the *Common Pleas*, where they must have an *Original* to warrant their Proceedings, it was more difficult: Therefore here,

here, at first, the Plaintiff was obliged to sue out an *Original*, where the Action arose; and then a * *Testatum Capias* into another County where the Defendant was to be found. But as this was tedious, chargeable, and inconvenient, this Court began to change the *Venue*, and allowed the Plaintiff to file a *new Original* to warrant his *Declaration*. Thus it continued until 21 J. 1. whereby *Personal* and *Transitory* Actions, as *Debt*, *Detinue*, *Assault* and *Battery*, &c. may be laid in any County.

However, the Courts, notwithstanding this Statute, upon an Affidavit, that the Cause of Action arose in such a County and not elsewhere, will of Course change the *Venue* to it's proper County, if not laid so; and this is now a Motion of Course. But *Local* Actions, as *Ejectments*, *Waste*, *Trespases*, *Quare clausum fregit*, &c. must be laid in the proper Counties where the Actions arose, or where the Lands lie.

With respect to the *Time* of laying the Action: In *Debt* upon *Bond*, or upon a *Note*, &c. the certain Day is deduced from the *Bond* or *Note* itself, and consequently will appear by the *Declaration* thereon. But in all Actions upon the *Case*, *Trespases*, *Assault*, *Battery*, &c. we are not obliged to lay the certain Day, the Cause of Action arose, in the *Declaration*; but if it be laid on some Day *after* the Cause of Action arose, and *before* the Commencement

* *Quere*, if this did not give Rise to the *Testatum*? The like Use of a *Test.* still continues, and in many Instances is deemed absolutely necessary, notwithstanding the Allowance to file a new *Original*.

of the Suit, it is sufficient. And it is with great Reason this is allowed, as in some Cases it may be impossible for a Plaintiff to ascertain the Day by Evidence, or it may be forgot, &c.

Of Imparlances, &c.

Formerly the *Declarations* used to be entered upon the *Roll*, then filed and *docketted*; and * *Continuances* used to be entered thereon from that Term until the Defendant pleaded to Issue, or confessed the Action; because then, in most Cases, the Defendant was not obliged to plead the same Term that the Declaration was of, but he was intitled to an *Imparlan*ce, *i. e.* Time to imparle or plead from that Term to the next subsequent Term.

In the *King's Bench* the Defendant had an *Imparlan*ce, vel *Licencia Interloquendi*, in all

* A *Continuance* was the continuing the last Proceeding upon the *Roll* from one Term to another, and so on, that no intervening Term might appear, for if there did, the Party not making such *Continuance* to keep himself as acting in the Cause, was said to be out of Court; and so if no Entry of an *Imparlan*ce appeared in the Declaration, the Defendant might have signed a *Non pros*, or *demurred*. But now the Statute of *Jeo faille*, 21 J. 1. helping the *filing* and *continuing* has occasioned the Disuse of it, for a *Bill*, or *Declaration*, is now never ingrossed and filed, and consequently no *Continuances* entered thereon but in particular Cases; for if there is no Writ of *Error*, there needs no *Bill* to be filed, though it is always charged, and allowed for as done in the *King's Bench*, because, I suppose, it may be required to be done,

Cases;

Cases; for being arrested on a general Writ of *Bill of Middlesex*, or *Latitat*, wherein no Cause of Action appeared, consequently he could not know the Cause of Action, nor how to make his Plea, until the *Declaration* was entered; and therefore was very reasonably indulged with an *Imparlance*.

But in the *Common Pleas* it was not general, for in some Cases the Defendant had an *Imparlance* of course, in others not; for Instance, If the Defendant appeared upon an Arrest by a common *Clausum fregit*, he had an *Imparlance* of course; but if the Writ had been special, according to the Truth of the Action, and returnable the *first* or *second* Return of the Term, then the Defendant was to plead that Term, because the Plaintiff's *Complaint* or *Declaration* being set forth in the *Writ*, the Defendant could thereby know the Cause of Action, and how to make his Defence; and therefore in that Case, as he already had some Time to consider of it, and prepare his Plea from the *Summons*, there was the less Reason for his having further Time of course, especially so long Time as an *Imparlance*. But in all *Real Actions* the Defendant was intitled to an *Imparlance* of course.

Although in the *Common Pleas* the Defendant was indulged with an *Imparlance*, according to the Custom of this Court's Method of Proceeding, yet it was not customary, or the Practice of this Court, ever to make any *Entry* of an * *Imparlance* on the Roll, or in the Pleadings,

* And yet in an *Ejectment Cause* (because it's in the Nature of a real Action) an *Imparlance* must be entered

ings, otherwise than in this Manner at the Bottom of the Declaration, *Imparlance to the first Day of next Term*, which never appeared in the *Record*; for what did it signify to the Court whether or no the Defendant pleaded the same Term the Declaration was of, or not?

But in the *King's Bench* they always entered the Plea with the *Imparlance* before it, which was either *general*, when Defendant was intitled to it of course, and entered thus, *And now at this Day, that is to say, Friday next after eight Days of St. Hilary*, (being the first Return of that Term) *until which Day the said C. had Leave to imparle to the said Bill, and then to answer, &c.* Or else *special*, which was granted by the Court, and was prayed when the Defendant wanted to plead some special Plea, which he could not plead after a general *Imparlance*, (for there were several Pleas in Abatement and Bar, which the Defendant had no Right to plead after a general *Imparlance*) and therefore these Words were usually added thereto, *Saving all Advantages, as well to the Jurisdiction of the Court, as to the Writ and Declaration, &c.*

But now by a Rule in the *King's Bench*, *Trinity 5 & 6 Geo. 2.* * *Imparlances*, in some Respects, are taken away; for it is hereby

entered with the *Prothonotary*, i. e., the *Prothonotary* must be paid 2 s. for the Entry of an *Imparlance*, though none is made.

* To take away the *Imparlance*, or Time to plead in the *Common Pleas*, a Rule was made, *Mich. 3 Geo. 2.* to the like Purpose, from whence the Rule in the *King's Bench* was taken.

ordered

ordered, That if the Writ be returnable the *first* or *second* Return of any Term, &c. then if the Declaration be *delivered with Notice to plead four Days before the End of the Term*, the Defendant shall plead the same Term *without* any *Imparlance*; but if the Writ be *not* returnable the *first* or *second* Return; or in case it be, and the Declaration is not delivered with Notice to plead *four Days* before the End of the Term, then the Defendant has yet an *Imparlance*. So that an *Imparlance* now depends on the *Return* of the Writ, and the *Delivery* of the Declaration, and consequently the Entry thereof.

Whenever the Defendant is intitled to an *Imparlance*, the Entry of such *Imparlance* is made before the Plea as above, *viz. And now at this Day, that is to say, * Friday next after eight Days of St. Hilary in this same Term, (until which Day the said C. had Leave to im-* parle to the said Bill, and then to answer there- unto) before our Lord the King at Westminster come as well the said A. by his Attorney afore- said, as the said C. by R. B. his Attorney; and the said C. defends the Wrong and Injury when, &c. and saith that — Then follows the Plea.

* This is always the *first* Return of the Term the Plea is of, because by the Course of the *King's Bench* they never entered *Continuances* until the Plea came in, though the Declaration was delivered four Terms before; nor do they now make any *Continuances* from the Declaration to any intervening Term: As suppose the Declaration of *Easter* Term, and the Plea of *Hilary* next, no Notice is taken of *Trinity* and *Michaelmas* Term. See *post*, of making up *Issues*.

An Entry of an *Impar lance* in this Manner, is thought to be neither a material, nor a necessary Part of the Pleadings, from it's having never been used in the *Common Pleas*; and according to the present Practice of this Court, such an Entry is not made, when a *Plea* is of the *same* Term with the *Declaration*: And what indeed does it signify to the Court, whether or no it appears by the Record that the Defendant pleaded the *same* Term, or not *? And if it is not necessary, the Question will be, Whether the Use of it is in any Respect hurtful? One need only consult the Notes of Practice to see what Mischief has attended the Use of it, for though it doth not much lengthen the Pleadings, it often serves to perplex them, and leads the young Practitioner into Mistakes; for Instance, The Declaration was of *Hilary* Term, the Defendant did (as he may, and ought to do) deliver his Plea *with an Impar lance* of *Easter* Term; the Plaintiff took *Issue* on this *Plea*, and as he could not alter the Defendant's *Entry* of the *Impar lance*, he was obliged to make up his *Issue* of that *Easter* Term, and consequently award the *Venire* of that Term; though he did not deliver the *Issue* till after *Trinity* Term, because he could not (as it was a Country Cause) go to the Trial until

* Is there not as great a Reason for using such an Entry before a Replication, Rejoinder, or other Pleading, as before a Plea? These shall be intended, when they are entered of Record, that they were made of the *same* Term in which the Plea came in. Why not the Plea of the *same* Term with the Declaration,

the *Affizes* following. Now what was the Consequence of this? Why, when the Plaintiff came to pass his Record for Trial, on an *old Issue*, he had to pay the Clerk of the Dockets for a *post Terminum*, and 4 s. 8 d. to the Clerk of the Treasury for a *post Roll*, &c. All unnecessary Sums to be paid by the Plaintiff or Defendant, and yet this frequently happens.

But this is not all, for it is frequently the Occasion of greater Mischiefs, as when the Judgment comes to be entered up, it must be entered up with *Continuances* on the Roll by * *Viccomes non misit Breve* from the *Return* of the *Venire* to the *Teste* of the *Distringas*, which Entry of the *Continuances*, it is believed, is frequently forgot, and oftentimes omitted; and this through the Use of an *Imparlance*. And yet, if this formal Entry is not properly used, the Court, in all Probability, will set the Judgment aside, or allow it as a Matter of *Error*!

It is confessed, that in order to avoid paying *Post-terminums*, &c. it is most usual for the Defendant to deliver his Plea *without* the Entry of the *Imparlance* before it, which leaves the Plaintiff at Liberty to make the *Imparlance* to the same Term he makes up his *Issue* of, which may be three or four Terms after the *Declaration* and *Plea*. But why should any Inlet to Mistakes or Impropriety remain in the Pleadings, when it may be removed without any Inconveniency whatever? And therefore would it not be better to discontinue the Use of the Entry of *Imparlances* in this Court, as it is in the *Common Pleas*?

* See under the Method of entering up Judgments in the *King's Bench*.

Of the Plea, and Pleadings.

A *Plea* is commonly taken for the Defendant's *Answer* to the Plaintiff's *Declaration*, though it may in general be taken for that which either Party alledgeth for himself in a Court, in a Cause there depending; and consequently *Pleadings*, in a large Sense, contain all the Matters which come after a *Declaration*, as well on the Plaintiff's Part, as on the Defendant's, until an *Issue* is joined between them.

A Plea pleaded to the Action is either *general* or *special*.

A *general Plea* is a concise and direct *Answer* of the Defendant to the Plaintiff's *Declaration*, framed and contrived of old in such Words as were proper to deny the whole Part of the Declaration: As if the Defendant was charged with a *Trespass*, the general Plea was, that he was *Not guilty* thereof, which is now commonly called the *general Issue*. Such is the Plea of *Nil debet*, or *He owes nothing*, to an Action of Debt on a Contract; *Non est Factum*, or *It is not his Deed*, to an Action of Debt on a Bond; or, *Solvit ad Diem*, or *He paid it at the Day*, to a Bond. Such is *Non assumpsit*, or *He did not assume upon himself, and promise*, &c. to an Action on the Case upon a Promise, &c.

A *special Plea* is a Plea drawn up in Form, setting forth the Matter pleaded at large, with an apt Conclusion to the Declaration or Action.

There are likewise other Pleas framed of old by the Courts, to answer the Occasion of them; and though they do not come under the

the Denomination of issuable Pleas, yet they are most commonly ranked with them as such, though they are rather a Confession of the Truth of the Plaintiff's Declaration; as *Non sum informatus*, or, *I am not informed to say any thing in Bar, &c.* *Nil dicit*, or, *He says nothing in Bar, &c.* *Cognovit Actionem*, or, *He confesses the Action, &c.* These were framed by the Court, to be used when the Defendant neglected to plead in Time, and by his Silence implied a Confession of the Action; for without such Means the Plaintiff could obtain no Satisfaction by his Suit: Or else they were really pleaded by the Defendant himself, in order to give the Plaintiff Judgment for his Demand, without the Expence of going to a Trial.

With respect to Pleading in general, it may be necessary to understand that the Tenor of the Writ is to compel the Defendant to appear in Court at the Return thereof, and defend the Plaintiff's Charge against him; at which Time, anciently, every Defendant, either in Person or by his Attorney, did actually appear, and plead what they had to say in their Defence, *Ore tenus* at the Bar. If it was any special Matter, the Counsel spoke such Matter at the Bar, and the Plaintiff's Counsel did likewise *Ore tenus* reply thereto. And the Prothonotaries, and their Entering Clerks, (whose Business it was) did enter such Pleadings in Books and upon Rolls, from which they transcribed the Issue Roll. But if it appeared to the Court, upon opening the Matter, that the Plaintiff had no Right to maintain his Action, the Judges *ex Officio* abated the Writ, or otherwise gave a

An Historical Treatise of a Suit at Law.

further Day to the Parties to reply, rejoin, &c.

But as the Business increased, and flowed in from the *Hundred* and *County Courts*, this Method became burthensome both to the Clerks and the Courts; and therefore, as observed before, Attornies received the Care of carrying on the Pleadings till an *Issue* was joined: but on bringing in the *Issue* Roll, they paid for the *Entries*, as if entered by the Prothonotaries themselves.

These Pleadings, Custom and Use had brought to a *general* Form in *general* Cases; and what in such Cases used to be spoken of course at the Bar, came at length to be given of course in Writing by the Defendant's Attorney, and are called *general Pleas*, or *general Issues*; and are as follow:

**Non est Factum to a Bond in the
King's Bench.**

And the said C. D. by R. B. his Attorney, comes and defends the Force and Injury, when, &c. and says that he ought not to be charged with the said Debt by Means of the said Writing Obligatory, because he says that the said Writing Obligatory is not his Deed. And of this he puts himself upon the Country.

**Non est Factum to a Bond in the
Common Pleas.**

And the said C. D. by R. B. his Attorney, comes and defends the Force and Injury, when, &c.

and says that he ought not to be charged with the said Debt by virtue of the said Writing, because he says that the said Writing is not his Deed. And of this he puts himself upon the Country.

Non est Fadum, by an Executor or Administrator, for either Court.

— And says that he ought not to be charged with the said Debt, by virtue of the said Writing, because he says that the said Writing is not the Deed of the said J. S. (the Testator) and of this he puts himself upon the Country.

Nil debet in the King's Bench.

And the said C. D. by R. B. his Attorney comes and defends the Force and Injury, when, &c. and says that he does not owe to the said A. B. the aforesaid 30l. nor any Part thereof, in Manner and Form as the said A. B. above complains against him. And of this he puts himself upon the Country.

Nil debet in the Common Pleas.

— And says that he does not owe to the said A. B. the said 30l. or any Part thereof, in Manner and Form as the said A. has above declared against him. And of this he puts himself upon the Country.

Nil debet in Debt qui tam, &c. in the King's Bench.

And the said C. D. by R. B. his Attorney comes and defends the Force and Injury, when, &c. and says that he does not owe to our said Lord the King and the said A. who as well, &c. the said 40l. nor any Part thereof, in Manner and Form as the said A. who as well, &c. above complains against him. And of this he puts himself upon the Country.

Nil debet in Debt, qui tam, &c. in the Common Pleas.

— And says that he does not owe to our said Lord the King, and to the said A. who as well &c. the said 40l. or any Part thereof, in Manner and Form as the said A. who as well, &c. has above declared against him. And of this he puts himself upon the Country.

Non detinet in Debt in the King's Bench.

And the said C. D. by R. B. his Attorney, comes and defends the Force and Injury, when, &c. and says that he does not detain from the said A. C. the said 30l. or any Part thereof, in Manner and Form as the said A. B. above complains against him. And of this he puts himself upon the Country.

Non

Non detinet in Debt in the Common Pleas.

Is Word for Word the same as in the *King's Bench*.

Non detinet in Case in both Courts.

— *And says that he does not detain from the said A. B. the said Goods and Chattels, in the said Declaration specified, or any Part of them, in Manner and Form as the said A. above complains against him. And of this, &c.*

Nil debet nec detinet in both Courts.

— *And saith that he doth not owe to the said A. B. the aforesaid 30 l. nor any Part thereof, in Manner and Form as the said A. hath above declared against him; nor doth he detain from the aforesaid A. the Horse aforesaid, in Manner and Form as the said A. hath above declared against him. And of this, &c.*

Non infregit Conventionem for either Court.

And the said C. D. by R. B. &c. and says that he did not break the said Covenant (or Covenants, or any one of them) in the said Declaration above specified, in Manner and Form as the said A. above thereof complains against him.

An-Historical Treatise of a Suit at Law.
 him. And of this he puts himself upon the Country.

Non assumpsit in the King's Bench.

And the said C. D. by R. B. his Attorney, comes and defends the Force and Injury, when, &c. and says that he did not undertake in Manner and Form as the said A. B. above complains against him. And of this he puts himself upon the Country.

Non assumpsit in the Common Pleas.

Is the same as in the King's Bench.

Non assumpsit by Executors or Administrators for either Court.

And the said C. D. and E. F. by, &c. and say that the said E. F. (the Testator) in his Life-time, did not undertake, in Manner and Form as the said A. B. above complains against them. And of this they put themselves upon the Country.

Not guilty in Case in the King's Bench.

And the said C. D. by R. B. his Attorney, comes and defends the Force and Injury, when, &c. and says that he is not guilty of the Premises above laid to his Charge, as the said A. above

above complains against him. And of this he puts himself upon the Country.

Not guilty in Case in the Common Pleas.

Is the same as in the King's Bench.

Not guilty in Trespass in the King's Bench.

— *And says that he is not guilty thereof. And of this he puts himself upon the Country.*

Not guilty in Trespass in the Common Pleas.

— *And says that he is not guilty of the said Trespass, as the said A. above complains against him. And of this, &c.*

Not guilty in Trespass and Assault in either Court.

— *And says that he is not guilty of the said Trespass and Assault, &c.*

The common Replication to each of these general Issues is this, *And the said A. doth the like, that is, doth likewise put himself upon the Country.* Whereupon the Issue is joined between the Parties.

These

These *general Pleas* are transcribed from the common Books of Practice, only to shew that there is no material Difference between the Forms of them, but that they may be used indifferently for one Court as the other.

Special Pleadings were formerly divided into two Kinds only, *viz. Pleas in Abatement*, and *Pleas in Bar*. The Order of Pleading was, *first*, to the Jurisdiction of the Court; *secondly*, to the Person of the Plaintiff; *thirdly*, to the Count; *fourthly*, to the Writ; *fifthly*, to the Action of the Writ; and *sixthly*, in Bar of the Action itself.

A *Plea in Abatement* was temporary, and too often dilatory; for it was not to destroy the Plaintiff's Action, but only to stop the Cause for a while, until some Defect was removed: As a *Misnomer* of the Defendant, to cure which the Plaintiff entered up a Discontinuance by *Nil Capiat per Breve* on the Roll, and then brought a new Action in the Defendant's right Name; which shews this Plea was generally made use of to gain Time.

The *Plea in Bar* was an Objection to the Plaintiff's Action, and went to the Right in Demand, shewing Cause why the Plaintiff ought not to have the same; and it was either peremptory and perpetual, as when the Defendant pleaded a *general Release*, which destroyed the Plaintiff's Action for ever. Or it was temporary, and barred only for a Time; as the *Plea Plene administravit*, which is a good Plea in Bar, until more Goods come to the Executor's Hands.

Pleas in Bar, in many Cases, were reduced to a general and concise Form, as was the
general

general Issue; and they were called *general Bars*, as, *Infra Ætatem, Solvit ad Diem, Son Assault, Plene administravit, Riens per Descent, Nul tiel Record, per Minas, Comperuit ad Diem; Non assumpsit infra sex Annos, St. 21 Jac. 1. Non Cul. infra sex Annos; Actio non Accrevis infra sex Annos, &c.*

All these Pleas had a formal Beginning and Ending; for Use and Practice naturally introduce Form and Method, from which all our Pleadings had their Rise. The apt and proper Beginning of a Plea in Abatement was, and is, *That the Defendant ought not to answer the Bill, or Declaration, &c.* And it concluded thereto, thus, *Whereupon he prays Judgment of the Bill (or Declaration) aforesaid, and that the said Bill be * quashed.*

The apt and proper Beginning of a Plea in Bar was, and is, *That the Plaintiff ought not to have or maintain his Action aforesaid against him, because he saith that, &c.* And it concluded to the Action thus, *Wherefore he prays Judgment if the Plaintiff ought to have or maintain his Action aforesaid against him, &c.*

All Affirmative Pleas were concluded, *And this he is ready to verify.* But Negative Pleas were to be averred, because it was a Maxim, *That Negatives cannot be proved.*

* To *quash*, from the old French, *Quasser*, is to overthrow or annul any Thing. So when an Indictment, Order of Sessions, Presentments, &c. are set aside by the Court for Insufficiency, they are said to be quashed.

Also when the Defendant pleaded to Issue, he concluded, * *And of this he puts himself upon the Country*; and when the Plaintiff did, he said, *And this he prays may be inquired of by the Country*; and the other Party joined Issue by saying, *And the said* doth so likewise. For tho' the Issue may consist of several distinct Pleadings, yet this at last must be the Conclusion of every Issue to be tried by a Jury. And indeed it often did, and does now more frequently happen, that when the Plea was *special*, and to which the Plaintiff could not take Issue, he was under a Necessity of replying specially, and many other Pleadings went to the making up the Issue; as a † *Rejoinder* to the *Replication*, a *Surrejoinder* to that; a *Rebutter* to the *Surrejoinder*, and a *Surrebutter* to the *Rebutter*, &c. so that an Issue in fact was joined sooner or later, as the Matter

* Every Defendant is under a Necessity of defending himself, and consequently will put himself upon the fairest Means, of having Justice done him, which the Law gives him; and that is, *to put himself upon his Country* for their Judgment and Opinion of the Matter, which the Court must grant him: but a Plaintiff, who is as a Petitioner to the Court wherein he sues, *prays it may be inquired of by the Country*.

† Pleadings are divided into *Bars*, *Replications*, *Rejoinders*, *Surrejoinders*, *Rebutters*, *Surrebutters*, &c. These are Words of Art, and are called *Bars*, *Barrae*, because it bars the Plaintiff of his Action; *Replicatio*, á *Replicando*; *Rejunctio*, á *Rejungendo*; *Rebutter*, from the French Word *Rebouter*, á *Repellando*; and so of *Surrebutter*, &c. In ancient times, says my Lord Coke, a Bar was called, *Exceptio peremptoria*; a Replication, *Replicatio*; a Rejoinder, *Triplicatio*; a Surrejoinder, *Quadruplicatio*, &c.

gave

gave Room for it. And it might happen that sometimes the Plaintiff, and sometimes the Defendant, first concluded *to the Country*; and all such special Pleadings were concluded agreeably to the Nature and Effect of them, viz. *Whereupon the said* as before, *prays Judgment whither, &c.* for, as observed, Method and Form being introduced by Practice, begun and ended all our Pleadings.

The Rules for Pleading were, that all Pleas were to be succinct, without unnecessary Repetitions, and direct and pertinent to the Case, and not by Way of Argument or Rehearsal, but directly an Answer to the Charge in the Declaration; that every Plea was to be *single*, and certain, and not to contain a Variety of Matter to one and the same Thing. A *double Plea* was not allowed to be good, because where there was a double Matter, no certain Issue could be taken: As for Instance, If an Infant sealed an Obligation by *Duress*, he could not by his Plea take Advantage both of *Infancy* and *Duress*, by reason of Duplicity, lest the Jury should be too much incumbered. This was deemed a great Reproach, and as such was cast on the Courts at *Westminster* by the *Civilians*, who said, 'Twas forcing a Man to fight with one Hand tied behind him: The *Civilians* had certainly the Reason on their Side, for why should a Man be debarred from using every Plea he can in his own Behalf? But see 4 & 5 *Ann. c. 16.* whereby Leave is now given to plead as many several Matters as are thought to be necessary. However, this must
be

be by Leave of the Courts, as some double Pleas may be contradictory in themselves, &c.

It was a Rule that every Defendant's Plea should be taken most strongly against himself; for it was reasonable to suppose, that every Defendant would at first set up the best Defence he could. But a Defendant, who was not obliged to plead a special Plea, might plead the general Issue proper to the Action, and give the special Matter in Evidence; and in many Cases the general Issue was allowed, to avoid Tedioufness and Multiplicity: And such Pleadings were reduced to a very concise Form, and more consonant to the general Rules of Pleadings, than what they are at this Time.

That our Pleadings were not only greatly lengthened, but as greatly multiplied before the Act of 4 & 5 *Ann.* to what they were in ancient Times, is very evident from the Pleadings themselves; and the Length of Records now is not only a great Expence and Burthen to the Parties, but is a Reproach to the Law itself.

Sir *Matthew Hale*, speaking of the Length of the Proceedings in his Time, in Comparison to what they had been, says, "The Reasons
"whereof seem to be these, *first*, because in
"ancient Times the Pleadings were drawn at
"the Bar, and the Exceptions also taken at
"the Bar, which were rarely taken for the
"Pleasure or Curiosity of the Pleader, but
"when it was apparent the Omission or Mat-
"ter excepted to was the very Merit and
"Life of the Cause, and purposely omitted
"or mispleaded, because the Matter would
"bear no better; but *now*, the Pleadings
being

“ being *first drawn in Writing*, are drawn to
“ an *excessive Length*, and with very much
“ Labouriousness and Care enlarged, lest it
“ might afford an Exception not intended by
“ the Pleader, and which could be easily sup-
“ plied from the Truth of the Case, lest the
“ other Party should catch the Advantage,
“ which commonly the adverse Party studies,
“ not in Contemplation of the Merits or Jus-
“ tice of the Cause, but to find a Slip to
“ fasten upon; though, in Truth, either not
“ material to the Merits of the Plea, or at
“ least not to the Merits of the Cause.” *Hist.*
of the C. L. It may be added, that *of late*
it hath been attempted to catch and intangle
an Adversary by Length and Intricacy of Plead-
ing; but the learned Artist was properly
caught in his own Net.

My Lord Coke observes, and it is worthy
Observation, “ That in the Reigns of *Ed. 2.*
“ *Ed. 1.* and *upwards*, the Pleadings were
“ plain and simple, but nothing curious, ever-
“ more having chief Respect to Matter, and
“ not to Forms of Words, &c.” In the Reign
of *Ed. 3.* he says, “ Pleadings grew to Per-
“ fection, both without Lameness and Curio-
“ sity; for *then* the *Judges* and *Professors* of
“ the Law were excellently *learned Men*, and
“ the Knowledge of the Law flourished; the
“ *Serjeants* of the Law drew their own Plead-
“ ings, &c.” So likewise says Sir *Matthew*
Hale, and further, that “ Though Pleadings
“ in the Times of those Kings (meaning *H. 4.*
“ *5.* & *6. Ed. 4.* & *5.* and *H. 7.*) were far
“ shorter than afterwards, especially after *H.*
“ *8.* yet they were much longer than in the
“ Time

“ Time of *Ed. 3.* and the Pleaders, yea and
 “ the Judges too, became somewhat too cu-
 “ rious therein ; so that, that Art and Dexte-
 “ rity of Pleading, which in it's Use, Nature,
 “ and Design, was only to render the Fact
 “ plain and intelligible, and to bring the Mat-
 “ ter to Judgment with a convenient Cer-
 “ tainty, began to degenerate from it's pri-
 “ mitive Simplicity, and the true Use and
 “ End thereof, and to become a Piece of Nice-
 “ ty and Curiosity; which how these latter
 “ Times have improved, the very *Length* of
 “ the Pleadings, the many and unnecessary
 “ *Repetitions* and *Miscarriages* of Causes, upon
 “ small and trivial Niceties in Pleading, have
 “ too much witnessed.”

What these great Men have said may be
 considered as a Reproach to the Pleaders, who,
 through Ignorance of the real Points on which
 the Merits of the Cause might depend, chose
 to fill their Pleadings with a Multitude of nice
 and curious Matters, rather than omit any
 Thing which the adverse Party might take an
 Advantage of; or perhaps with a View that
 the Pleadings, by Length and Intricacy, might
 puzzle and perplex one another. Be it as it
 will, it must be allowed that the Merit would
 be infinitely great in him, who should find
 Means to reduce the Pleadings to a more con-
 cise and simple Form, or chalk out some
 Method intirely to supply the Use of special
 Pleadings. How many Instances may be giv-
 en, where, by pleading generally, a Cause
 might have been tried upon an Issue of no
 more than 10, or 12, or 14 Sheets, which by
 special Pleadings has been spun out to 100,

150, or 200 Sheets, and which, where the Matter in Dispute has not been above 5 s. Value, has cost the Party 200 l. ? Is this an Honour to the Law ? Is it not enough to deter any Man from taking a Remedy to protect his Right and Property ? If what these learned Judges have said was before the Act for pleading several Matters, what shall one say now, when special pleadings are so greatly increased, and are drawn with so much Labour and Nicety, and so vastly spun out, as to render an Issue of such prodigious Length ? Special Pleadings may be now said to be a particular Branch of the Law ; and yet how few know it's Form and Niceties ? Attornies know but little of the Matter ; in short, they don't pretend to it, for as special Pleadings must be signed by Counsel, they first get them drawn by some Gentleman, who by his Practice has gained Skill and Experience therein, and then get the Draught settled and signed by some eminent Counsellor, who stuffs it with all the curious and nice Matters it may *seem* to want. It is sufficient for an Attorney (I was going to say) to understand the Terms of Art used therein, and what they import ; as *Averments, Protestandoes, Bars, Traverses, Justifications, Pleas puis darreign Continuances, Affirmatives, Negatives, Repugnants, &c.*

However well designed the Stat. of 4 & 5 *Annæ* was, yet 'tis a *Quære* if ever any Act, that was made for the Amendment of the Law, tended so much to increase the Expence of a Suit as that does ; so that People have much more Reason to exclaim and cry out against it than ever they had. This is a Branch of the

Law so luxuriant in its Nature, and spreads so wantonly and viciously, as to want much pruning; and it may be truly said, through this only, that a Client *often breaks his Teeth by endeavouring to come at the Kernel*; or, in other Words, *that the Remedy is worse than the Disease.*

To give one Example only of the evil Effects of *special Pleadings* out of the great Number of Actions for *Trespases*, and upon the *Case*, which are brought upon much less Occasions. Please to observe the *Issue* placed at the End of this Treatise, wherein the Pleadings were grounded upon the following Circumstances: The Inhabitants of *W. in Oxfordshire* had enjoyed a *Right* of Angling in the River *Thames*, without any Interruption, Time immemorial, until it happened that the Defendant *F. G.* caught a small Salmon, (a Thing never known there before, it being so far up the River.) This was too alarming to the *Plaintiff* who rented the Fishery, and thereupon he went and demanded the *Fish*, which the Defendant refused to give up; and to make sure Work of it, sold it to a neighbouring Gentleman for 2*s.* The *Plaintiff* upon this complained to his Landlord, who was wise enough to forbid the Peoples angling, and ordered an Action to be brought against the Defendant *F. G.* and others, who were in Company with him. The *Right* of a *free Fishery*, which the *Plaintiff* now claimed, coming in Question, in order to try it, (as it tended to take away and destroy the innocent Amusement of the Inhabitants, which they had so long enjoyed) some *Freeholders* and *Copyholders* of

of the Parish gave the Defendants Liberty to justify under them, as having a *Right of fishing in half the Stream next to their Lands*; a Thing that was advised, as absolutely necessary, for the Defendants to avail themselves by. And the Cause was tried upon this Issue, folio near 160, which cost the Parties above 200 l. The Plaintiff succeeded under an old Grant of the Fishery. *Quære*, what did he gain by it? And *quære*, if no Method can be found out for trying such a Cause upon the *general Issue* with equal Advantage to the Defendant?

Of an Issue in Fait, or Fact.

An *Issue*, arising from the Pleadings, is the next Thing to be spoken of. An *Issue* is said to be joined, when there is a certain Point or Matter issuing out of the Allegations of the Plaintiff and the Defendant, which consists of an *Affirmative* on one Side, and a *Negative* on the other; and therefore it is called an *Issue* from the French Word *Issuer*, to flow from.

An *Issue* is of two Kinds, *viz.* an *Issue in Law*, and an *Issue in Fait, or Fact*. An *Issue in Law* is joined upon a *Demurrer*, and the Matter of Law is to be determined by the Court. An *Issue in Fait, or Fact*, is joined, when, as is before observed, there is an *Affirmation* of a Thing on one Side, and a *Negation* on the other, which fix a certain precise Point to be tried by a Jury; as when the Plaintiff declares that the Defendant owes him 20 l. and the Defendant pleads *Nil debet*, or that he owes the Plaintiff nothing. Now whether he

owes the Plaintiff any Thing or not, is the Issue to be tried by the Jury.

Of making up an Issue in the King's Bench.

The Parties being at Issue, all the Pleadings that go to the making up of the Issue are to be joined together in Form and Order, that the same may be entered on the Issue Roll, taking them in Course as they were pleaded. It has been observed that anciently several distinct Rolls were made use of, as the *Impar lance* Roll, the *Plea* Roll, &c. and from these they used to transcribe the *Issue*, or *Nisi prius* Roll, on the Back of which they entered up the *Judgment*. But now as the Proceedings are carried on by Paper Copies, the *Issue* is made up from these Copies; and then a Copy thereof is given to the adverse Party on a treble *1 d.* Stamp Paper.

The Method of making up the Issue is thus in the *King's Bench*.

If the *Issue* is joined of the *same Term* that the *Declaration* is of, then the same is begun by a *Memorandum*, as introductory to the Pleadings; then follows the *Declaration*, next the *Plea*, without any Form of an *Impar lance*, with the Rest of the Pleadings in order, and then the *Award of the Venire*, thus:

Hilary Term in the first Year of the Reign of
King George the Third.

Lee.

Berkshire,

Berkshire, to wit. * *Be it remembered that on Wednesday next after eight Days of St. Hilary, (the first Return) in this same Term. before our Lord the King at Westminster, A. B. † comes by R. B. § his Attorney, and brings*

* When this Court begun to take Cognizance of *Civil Actions by Bill*, on the Reasons my Lord Coke observes, it might then have been thought necessary that it should be certified to the Court on the Trial of such Causes, that the Suit was *by Bill*, and not by *Original*, the Defendant being in the *Custody* of the *Marshal* of the King's *Marshalsea*; and therefore this *Memorandum* might have been framed for that Purpose, and made Part of the Record, lest it should be afterwards questioned whether the Court had a Jurisdiction to take Cognizance thereof. So that this *Memorandum* speaks it's own Significancy, viz. that the Defendant being in *Custody* of the *Marshal*, the Plaintiff came and filed his *Bill* against him, and gave *Pledges* to prosecute; and these *Pledges* being hereby certified to have been given, is the Reason why they are omitted at the End of the *Declaration* in making up the *Issue*. But whatever the Reason might have been that this *Memorandum* was used, what is it's present Use? It is full of *Falities*, and serves only to lengthen the *Issue*, and so far tends to heighten the Costs of entering it, and passing the Record, &c. See *Notes* before.

† The whole *Term* is reckoned but as one Law-day, and though this relates to the first Day of the *Term*, it is rather said *comes*, than *came*, the present Tenſe beſt agreeing with the *Term-time*.

§ The Name of the Plaintiff's Attorney appears not in the Pleadings, but by this *Memorandum*; and by the Description of the Court held before the Lord the King himself, and also the Cause of *Action* here

An Historical Treatise of a Suit at Law.

brings into the Court of our said Lord the King, before the King himself, now here, his Bill against C. D. being in the Custody of the Marshal of the Marshalsea of our said Lord the King, before the King himself, of a Plea of Trespass on the Case, (as 'tis) and there are Pledges for the Prosecution thereof, to wit, John Doe and Richard Roe, which said Bill follows in these Words, to wit, Berkshire, to wit, A. B. complains of C. D. being in the Custody of the Marshal of the Marshalsea of our Lord the King, before the King himself, for this, to wit, that whereas, so on to the End of the Declaration, omitting Pledges, &c. and then the Plea in a new Line, with the Replication and Award of the Venire, viz.

*And the said C. D. by O. P. his Attorney, comes and defends the Force and Injury, when, &c. and saith that (the Plea, Verbatim) and thereupon he puts himself upon the Country; and the said A. B. doth the like; * Therefore let*

fet forth, (which is not mentioned in the Pleadings, but only in this *Memorandum*) it is most reasonable to suppose that, *originally*, the *Memorandum* was inserted *before* the *Bill* filed, and likewise *before* the *Declaration*, which was delivered as a Copy of it: And if it must be still used, it is most proper to be used *before* the *Declaration*, notwithstanding no *Bill* is filed, as it alledges.

* The Award of the *Venire*, when the Parties *are* come to *Issue*, is supposed to be the Act of the Court, and was then immediately entered on the *Issue Roll* by the entering Clerks, and is now awarded of course
on

let a Jury come thereupon before our Lord the King at Westminster, on
next after and who neither, † &c. to*

on the Paper Copy of the *Issue* by the Attorney, and ought to be made returnable therein of the same Term.

* The *Venire* was originally the only Process that issued for bringing a *Jury* to try the Cause. But after the *Distringas* was introduced for that Purpose, the *Venire* was, and is now made returnable some Day before the Trial: As if the Cause is to be tried in *Town*, then the *Venire* is made returnable the first Return, or some other Return, before the *Sittings*; so that the *Distringas* may bear *Teste* on that Return Day, and be returnable some Return Day after the *Sittings* the Cause is intended to be tried at. Or if the Cause is to be tried in the *Country*, then the *Venire* is made to bear *Teste* the first, or some other Day in the Term preceding the *Assizes*, and is made returnable the last of that Term, in order that the *Distringas* may bear *Teste* on that Return Day, and be made returnable the first Return of the subsequent Term, after the *Assizes*. This is supposing the *Issue* was made up of that preceding Term; if not, see *post*. Some Attornies leave a Blank for the Return of the *Venire* in the Copy of the *Issue*, and some make it returnable some Day in the Term the *Issue* is joined, as it ought to be.

† These Contractions being explained by the Words at Length, need here no further Enclaircisement, other than *facere recognitionem* being rendered to recognize, it may be observed, that as *Cognition* is Knowledge, Acknowledgment, or Opinion; so to recognize is to take Knowledge of, by a well-weighing, or serious Acknowledgment of the Truth of the Matter.

An Historical Treatise of a Suit at Law.

recognize, &c. * because as well, &c. † the same Day is given to the said Parties there.

These &c.'s are Contractions of the general Words in the Writ of *Venire*, which is here awarded, and the Words may as well be put at Length, viz. *And who are in no wise of Kin either to the said A. B. or to the aforesaid C. D. to recognize upon their Oath the whole Truth of the Premisses, because as well the said A. as the said C. have put themselves upon that Jury, the same Day is given to the said Parties there.*

This Memorandum, I presume, was originally inserted before the Bill filed, not only because it is said that the Acts of the Court were entered by way of Memorandums, but the Thing itself seems to declare it; consequently it then related to the first Day of the Term, or the very Day of filing the Bill: but when they came to make up the Issue, perhaps two or three Terms afterwards, they varied the Memorandum accordingly, and said,

Berks. ff. *Be it remembered, that in Hilary Term last past, before our Lord the King at Westminster, came A. B. by R. B. his Attorney and brought into the Court of our said*

* For their just and impartial Opinion of the Matter which they come to recognize.

† The *Dies datus* is the Order of the Court to the Parties, to come at the Return of the *Venire*, before the Court and Jurors to receive their Opinion of the Matter to be tried, which by the Issue they had put themselves upon,

Lord the King then there his certain Bill against C. D. being in the Custody of the Marshal, &c.—The Rest as in the former one.

But as the filing the Bill came to be left off, the Memorandum was only used before the Issue, as at present; but still it refers to a Bill supposed to be filed, and therefore now varies in four Cases, *viz. first*, when the Declaration (or Bill) is of the same Term with the Issue, as in the first Precedent; *secondly*, where it is necessary to make it of a particular Day in the same Term with the Issue, as where the Cause of Action arose after the first Day of the Term, in which Case they only mention the certain Day of filing it, thus:

Berks. ff. *Be it remembered, that on Saturday next after eight Days of St. Hilary, in this same Term, &c. as in the first Precedent.*

Thirdly, Where the Declaration is of a precedent Term, as we have seen by the second Precedent before; and *fourthly*, where the Declaration is above four Terms before the Issue is made up, in which Case they can't say — of Hilary Term last past, but

Berks. ff. *Be it remembered that heretofore that is to say, in the Term of St. Hilary in the Year of the Reign of our Sovereign Lord George the Third, now King of Great Britain, &c. before our said Lord the King at Westminster, came A. B. by R. B. his Attorney, &c. ut supra.*

And

An Historical Treatise of a Suit at Law.

And whenever the *Issue* is made up of a *Term* subsequent to the Declaration, the *Plea* is entered with an *Imparlan*ce before it, thus :

Berks. ff. *Be it remembered, that in Hilary Term last past, before our Lord the King at Westminster, came A. B. by R. B. his attorney, and brought into the Court of our said Lord the King then there his Bill against C. D. being in the Custody, &c.* The Rest as in the former one, then the *Plea* with the *Imparlan*ce. *And now at this Day, (that is to say)*

next after

(the first

Return of that Term the Issue is made up) in this same Term, to which Day the said C. had Leave to imparle to the Bill aforesaid, and then to answer the same before our Lord the King at Westminster, came as well the aforesaid A. by his Attorney aforesaid, as the said C. by E. F. his Attorney; and the said C. defends the Force and Injury, when, &c. and saith that — The Plea verbatim, with the Award of the Venire as before.

This *Imparlan*ce was formerly used in all Cases, because in all Cases the Defendant was intitled to it; and it was then usual to enter such *Imparlan*ce before the *Plea* upon the *Plea Roll*, and which of course was of the very *Term* the *Plea* came in; and so when they came to transcribe the *Nisi prius Roll* from the *Plea Roll*, the *Imparlan*ce of course appeared to be of the *Term* the *Plea* came in, and thereby discovered the *Term* in which the *Issue* was joined; and as the Plaintiff could not alter these Entries, they were frequently

frequently obliged to make up the *Nisi prius* Roll from an old Issue; in which Case there were claimed extra Fees by the Clerk of the Dockets and Clerk of the Treasury, for Post Term and a Post Roll, &c.

But when these Entries on the Roll were laid aside, and Attornies delivered their Pleadings in Paper, then they delivered the Plea without any imparlance before it, on purpose that the Plaintiff's Attorney might make the Entry of the Imparlance of the same Term he made up the Issue, (though the Plea was two or three Terms before then) and thereby preserve it from being an old Issue, in order to avoid paying such Exactions: For Instance, the Declaration was of *Easter* Term, and the Plea of *Trinity*; the Issue was made up of *Hilary* following, and the Imparlance to the same Term; but it is said this Practice is not warranted by the Proceedings. See more of Imparlances *ante*, p.

The *Memorandum* is to shew when the *Bill* was filed, or supposed to be so; and the *Imparlance*, when the Plea came in. But of what *necessary* Use is either? The Court of *Common Pleas* uses neither one nor t'other, as we shall see; and it is very evident by what was observed before, that the Use of the Entry of the *Imparlance* in this Court, only tends to create an Expence in the Suit, not only in lengthening the Issue, but in unnecessary Fees to the Officers, and also by multiplying Continuances on the *Judgment Roll*, which ought to be avoided, for the Sake of Plainness and Perspicuity,

Of making up an Issue in the Common Pleas.

The *Issue* in the *Common Pleas* was anciently transcribed from the several *Rolls* made use of in this Court; as the *Appearance Roll*, the *Imparlance Roll*, the *Plea Roll*, &c. from which they made up the *Issue Roll*; from which *Rolls* Copies were used to be taken for the Parties out of the *Prothonotaries Office*. And though the Proceedings are now carried on by the *Attornies* by *Paper Copies*, as in the *King's Bench*, where they first begun it, and introduced the same Practice in this Court; yet upon passing the Record with the *Prothonotary*, or upon signing a *Non pros*, entering a *Discontinuance*, &c. the *Prothonotary* is still paid for the *Entries*, as if entered on his *Rolls* by his Clerks; and this, though no *Roll* be yet in the Office.

Therefore the *Issue* is now made up by the Attorney, by only copying over all the Pleadings in due Course and Order; as first, the *Declaration*, then the *Plea*, then the *Replication*, &c. and after all, the Award of the *Venire*. This is joining the *Issue* in a very simple and plain Manner, without any unnecessary or intermediate Entry, which is presumed to be no Part of the Pleadings, as the Entry of the *Memorandum* before the Declaration, and the *Imparlance* before the Plea in the *King's Bench*, thus:

Jones Hilary Term, in the
Year of the Reign of King George the second.

Berkshire, to wit. C. D. late of W. in the said County, Yeoman, was attached to answer to A. B. in a Plea of Trespass on the Case, &c. and whereupon the said A. by R. B. his Attorney complains, that whereas the said C. &c. so on to the End of the Declaration, and then the Plea in a new Line, thus:

And the said C. by E. F. his Attorney, comes and defends the Force and Injury, when, &c. and saith that (the Plea Verbatim, and then in a new Line, each subsequent Pleading, if any) And of this he puts himself upon the Country, and the said A. doth the like; (then follows the Award of the Venire) Therefore the Sheriff is commanded, that he cause to come here, on the Morrow of the Purification of the Blessed Mary, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

Or they award the Venire in Words at Length, viz.

Therefore the Sheriff is commanded that he cause to come here, on the Morrow of the Purification of the Blessed Mary, twelve free and lawful Men of the Body of his County, each of whom having 10 l. a Year at the least in Lands, Tenement, or Rents, by whom the Truth of the Matter may be the better known, and who are in no wise of Kin either to the said

An Historical Treatise of a Suit at Law.

said A. or to the said C. to make a certain Jury of the Country between the Parties aforesaid, of the Plea aforesaid, to recognize upon their Oath the whole Truth of the Premises, because as well the said A. as the said B. between whom the Difference is, have put themselves upon that Jury.

The * *Dies datus*, which is added in the *King's Bench*, is not used at all in the *Common Pleas*, on the Return of the *Venire*, at this Time; nor do they give a *Dies datus* even on the Award of the *Habeas Corpora*, which is easily accounted for: And therefore why it is not used on either in the *Common Pleas*, and in the *King's Bench* on both, will be better considered in speaking of the Jury Processes, where the Reason for this Omission in the *Common Pleas* will appear.

Though the Form of the Writ of *Venire* itself (except the Return) is the very same in both Courts, yet you see the Award thereof, in the *Common Pleas*, is much more full than the Award thereof in the *King's Bench*. Now if we have Respect to the Court the Writ is awarded by, and made returnable in, we may easily account from whence this Difference arose: As for Instance, in the *King's Bench* the Writ is supposed to be awarded immediately

* A *Dies datus* is a Day, or Time of Respite, given by the Court to the Parties, from that Day to the Day given for them to appear again, and is used upon several Occasions; and wheresoever such a Time of Respite is given, it seems proper for a *Dies datus* to be entered.

by the King himself, who is supposed to be there in Court; therefore it is *imperatively* said, *Let a Jury come thereupon before, &c.* now, *Let a Jury* supply those Contractions of *twelve, &c.* and *by whom, &c.* But in the *Common Pleas*, where the Writ is awarded by the Court, by virtue of a Commission or delegated Power, it is said, *Therefore the Sheriff is commanded, viz.* by virtue of that Power, *that he cause to come*, not by the *Posse Comitatus* to force them, but by *bonos Summonitores*, (good Summoners) or cause them to come *here, viz.* at *Westminster*, where the Court was settled, *twelve, &c.* See *Venire*.

Here we see an Issue joined in a very plain and simple Form, closed with an Award of a full and instructive *Precept* to the Sheriff, to summon a Jury to come and try that *Issue* at *Westminster*, where the Court was settled; and then, all Trials being at the Bar, there was no other Record made up than the *Issue Roll* itself; which, being in Court, was the proper Record, on the Back of which they entered up the Judgment. And thus it continued from the making of *Magna Charta*, as 'tis presumed, until the Statute of *Nisi prius*, commonly called the Statute of *Westminster* 2.

This Statute was made by *Edward* the first, 1283, who first constituted Writs of *Nisi prius*, in order that Matters of *Law* might be tried in his *own Courts* at *Westminster*, and Matters of *Fact* in the *Country*; for which Purpose the *Venire* was made returnable some Day in the *next Term*, on which Return Day the *Sheriff* was to return the Jury, *Unless the Justices itinerantes prius tali Die et Loco venerint, &c.* And thus

thus the Clause of *Nisi prius* was first introduced in the *Venire*, and continued to be so from *Edward* the first to the Time of *Edward* the third.

The *Venire* commanded them to come in to Court, so that their Appearance before the Justices of *Assize*, or *Nisi prius*, was an Excuse for their Non-appearance in *Bank*. And though no *Issues* were returned on the *Venire* to make them appear at *Nisi prius*, yet the Difficulty was so much the greater on them to appear afterwards at *Westminster*, which they were obliged to do; for if they appeared not at *Nisi prius*, nor at *Westminster*, then issued the *Habeas Corpora* and *Distingas* to bring them in, with *Issues* returned. By this we see the *Habeas Corpora* and *Distingas* issued thro' Necessity, on a real Default of the *Jurors* not appearing on the *Venire*, and not in that formal Manner they do now.

King *Henry* the second, in the 23d Year of his Reign, divided the Kingdom into six Parts, and to every Part he assigned three Justices, called by *Bracton*, *Itinerantes*, and by *Britton*, *Justices* in *Eyre*, to distinguish them from the others, who were called, *Residentes*, *Sedentes*, and afterwards *Justiciarii de Banco*, which Title they now have. These Justices in *Eyre* had their Circuits, not unlike our *Assizes*, and so continued until the Reign of *Edward* the third, about which Time their Authority began to decline, by instituting Justices of *Assize* and *Wardens of the Peace*, now called *Justices of the Peace*; and in the next Reign (*Richard* the second) the Justices of the *Common Pleas* were authorized to take *Assizes*, &c. So that the *Justices* appointed for taking the *Assizes* were

were the *Justices itinerant*, who were appointed to go into every County for that Purpose, by a special Commission, and not the Justices of the *Common Pleas*; for these, as my Lord Coke observes, had no Power to take Assizes in the Country, until the 8th of *Richard the second*, c. 2. being about 150 Years after that Court was settled at *Westminster*.

Now in order to discover how the *Venire*, together with the *Habeas Corpora* and *Distringas*, came to be made out of Course, as they are now; and the Clause of *Nisi prius* to be taken out of the *Venire*, and placed in the *Habeas Corpora* and *Distringas*; it must be considered that by the Statute of *Marlebridge*, (52 H. 3. c. 11. 1267.) it was enacted, *that after a Man had put himself upon any Inquest, he should have but one * Essoin*; but that Statute not limiting the Time when the *Essoin* should be taken, it used most frequently to be taken on the *Habeas Corpora* and *Distringas*; for this Reason, if the Jury did not appear at *Nisi prius* on the *Venire*, which often happened, and as no Issues were returned on the *Venire*, in case they did not appear at *Westminster* on the Day in Bank, which was too expensive and troublesome for them to do, if they could avoid it; therefore they stood out until a *Habeas Corpora* (or *Distringas*) issued; and then, when

* It has been mentioned, that an *Essoin* was an Excuse for a Man's not appearing, and was allowed on divers Occasions, not only upon the Return of the *Original*, but on the Return of the *Venire*, &c. and were grounded on divers Causes, which were *traversable* by the Plaintiff.

they came to save the Penalty on the *Habeas Corpora*, (or *Distringas*) one of the Parties *ex-joined* himself; and the Jury, after much Expence and Trouble, returned *Re infecta*.

Now in order to remedy this, 'tis ordered by the Statute of *Westminster 2.* (13 E. 1. c. 27. 1285.) "That after any Man hath put himself
" on an Inquest, an *Essoin* shall be allowed him
" at the next Day, *postquam Aliquis posuerit se in*
" *Inquisitionem ad proximum Diem, alloquetur*
" *ei Essonium, sed ad alios Dies, &c.* but all
" the following Days, the taking the Inquest
" shall not be delayed by the *Essoin*, whether
" he was *essoined* before or no; neither shall
" any *Essoin* be allowed after the Day given
" *prece partium, &c.*" Now the *Proximus Dies*, after Issue joined, was the Return of the *Venire*; and therefore, in order to get rid of the Defendant's *Essoin* at *Nisi prius*, they made the *Venire* returnable the * same Term the Issue was joined; and by Consequence, when the Defendant was to cast an *Essoin*, he had no other Day to do it by the Words of the Statute than on that Return Day; and by this they got rid of all the *Essoins* on the Behalf of the Defendant at *Nisi prius*; for as the *Venire* was made returnable the same Term the Issue was joined, it was made returnable in Court without any Clause of *Nisi prius* in it, in order, as observed, to get rid of the Defendant's *Essoin* at the next Assizes. And hence it was, that the *Dies datus* was omitted in the *Common Pleas*,

* This shews that the Return of the *Venire* awarded at the Close of the Issue should be of the same Term.

in the Award of the *Venire*, (although it is still used in the * *King's Bench*) because the Party being in Court the same Term Issue was joined, continues in Court by his Attorney. By this we may understand, that if the Defendant appeared on the Return of the *Venire*, and did cast an *Essoin*, it was allowed; and then he could not be again essoined on the Return of the *Habeas Corpora* at the Assizes. But as it answered no End for the Defendant to essoin himself on the Return of the *Venire* when the Jury did not appear, consequently it dropt of course; and so having lost his Time to *essoin*, by not appearing on the Return of the *Venire*, the Jury was of course respited, and a *Habeas Corpora* and *Distringas* awarded, as appears by the Jurat. on the Record; and then by the Words of the Statute the Inquest was to pass, *whether he was essoined before or no*. And the Reason why no *Dies datus* is

* At this Time the *King's Bench* had but little to do in *Civil* Actions, and because they had not Business to fit the whole Term *de Die in Diem*, therefore they adjourned from one Day to another, and they gave a Day to the Parties to be present, when they sat on the *Venire*; but there was no Day given to the Parties on the *Distringas*, for the same Reason as in the *Common Pleas*, viz. because if the Defendant did not appear, the Inquest might pass by Default; but now, though that Court is come into the same Method of Practice with the *Common Pleas* in respect to the issuing the *Venire* and *Distringas*, we not only see a *Dies datus* on the *Venire*, but likewise on the *Distringas*; but whether it be done with any Propriety or not, would be some Satisfaction to know.

given on the Return of the *Habeas Corpora* to the Parties, is, because they were obliged to appear, or the *Inquest* should pass by Default.

We have observed that the *Venire* originally was the only Process that issued for bringing in a Jury to try the Cause; and the Writ itself is a full and instructive Precept for that Purpose; and the *Habeas Corpora* and *Distingas* never issued but through Necessity, which was not owing to any Defect in the Writ itself, but to the Defendant's being *essoignable* on the *Venire*, which was a great Hindrance to Justice; for if the Defendant appeared and *essoined* himself, the Jury returned, *Re infecta*; and if he did not appear, the Jury was obliged to appear in *Bank*.

Another Mischief, 'tis said, attended this Process, which was, that the Parties not seeing the *Pannel* before-hand, could not be prepared to make their *Challenge*.

These Mischiefs might have been easily remedied, by taking away the Defendant's *Essoins*, and ordering Issues to be returned on the *Venire*; and likewise by ordering the Sheriff to make his Return with the *Pannel* some certain Days before the Assizes, and then the *Venire* might have continued the only Writ, simple and plain in itself, for bringing on a Jury to try the Cause. But instead of this, a strange round-about Way was taken, whereby the Proceedings were multiplied, and the Record lengthened, without any Manner of Reason; for with respect to the first Mischief, we have seen what a Method in Practice was had to take away the Defendant's *Essoin* at the Assizes. It was further endeavoured to be remedied by
laying

laying Costs on the Defendant, where the Plaintiff prevailed. But with respect to the Pannel, it had no Remedy until the 42 *Ed. 3. c. 11.* whereby it is enacted, "*That no Inquest but Assize, and Delivery of Gaols, shall be taken by Writ of Nisi prius, before the Names of them, that shall pass on the Inquest, be re-turned into Court*". From this Time they could no more place the *Clause of Nisi prius* in the *Venire*, as was directed by the Statute of *Westminster 2.* and therefore it was taken out of the *Venire*, and placed in the *Habeas Corpora* and *Disstringas*. And from hence these Writs began to be made out for Trial in the same formal Way as it is continued to this Day. On the *Venire* was returned the *Jury*, and then the *Habeas Corpora* and *Disstringas* issued to bring them in. The Award of the *Habeas Corpora* and *Disstringas* appears by the *Jurata* in the *Record*, but does not at all appear on the *Issue Roll*, which is the proper Record, the Reason of which we shall see by-and-by.

The Statute of 42 *Ed. 3.* is said to have had many good Effects: *First*, the Parties knew the Names of the Jury; *secondly*, the *Venire* being returned, the Defendant had no *Essoin* on the *Habeas Corpora* and *Disstringas*, but was obliged to appear, or else by Stat. *Westminster 2.* the *Inquest* was taken by Default; *thirdly*, the Jury on *Nisi prius* were fined, if they did not appear. But from hence the Proceedings were multiplied by the common Use of the *Habeas Corpora* and *Disstringas*, and the Record lengthened by the *Jurata*.

We might here take a View of the *Nisi prius Roll*, or what we now call the *Record* for Trial;

but it may help to understand it the better, if we endeavour to explain the old Method of Practice a little further.

Before the Statute of *Nisi prius*, there could be no Occasion for a *Nisi prius* Roll, or any other Record than the *Issue* Roll, on which the Judgment after Trial was immediately entered up; but after the Statute of *Nisi prius*, the Clerks of the Treasury made up a Roll from the *Issue* Roll, which was called the *Nisi prius* Roll, as the other could not be carried out of the Treasury, but was to remain a Record of the Proceedings.

Now when *Issue* was joined, the *Venire* was thereby awarded to be returnable the last Day of that Term, without any *Nisi prius* in it, (as used to be;) and from that Day the *Habeas Corpora*, or *Distingas*, was tested, with the *Nisi prius* therein, and returnable on the Day in Bank, or the first Day of the Term after the Assizes. But in case the Parties did not go to Trial at the next Assizes after Issue joined, or in case the Issue was not joined of an issuable Term, then the Process of *Venire* was continued by *Vicecomes non misit Breve*, in this Manner, viz. *At which Day came the said Parties, by their Attorneys aforesaid, before his said Majesty's Justices at Westminster, and the Sheriff of the said County hath not sent back the said Writ to him as aforesaid directed; therefore the Sheriff, as before, is commanded that he cause to come, &c.* and then there was a new *Venire* awarded on the *Issue* Roll. And thus the *Venire* was continued from Term to Term, even to the Term wherein the *Habeas Corpora* or *Distingas* was tested. But the Award of the *Habeas Corpora* or *Distingas* was never entered on the Plea, or *Issue* Roll,

Roll, but only at the first Day of the next Term after the Assizes, when the *Postea* was returned, in entering up the Judgment, they begun with * *Postea Continuato inde Processu*, which was a Recital of the Continuance warranted by the *Placita* in the *Nisi prius* Roll. And the Reason of this Practice was this; if they had entered the Award of the *Habeas Corpora*, or *Distringas*, on the *Plea* or *Issue* Roll, and had not gone to Trial, they must from thence have awarded an *Alias* and *Pluries Habeas Corpora* or *Distringas*, which would have seemed to have obliged the Jury to come in Terms perhaps not *issuable*; but the other continued the Act of the Court as well; for *Postea Continuato inde Processu* shews, on the *Plea* or *Issue* Roll, that the last Award of the *Venire* was continued to the Day in Bank by the Process. And as it was neither expedient nor necessary to enter these Continuances of *Viccomes non misit*, &c. on the *Nisi prius* Roll or Record, therefore a general Entry was thought necessary thereon. And this was done by the *Placita* between the Award of the first *Venire* and the *Jurata*, which served to shew the Judge of Assize that it was an *Issue continued* to the last Term, and is now a Warrant to the Officer to continue the *Venire* on the *Issue* Roll until then; for this *Placita* was of the Term next preceding the Assizes,

* Though this Entry is yet used in the *King's Bench*, and that whether the *Issue* is tried the same Term or not, it has been long discontinued in the *Common Pleas*, there being properly no Continuance necessary, but by *Vic' non misit*, &c.

and by Consequence was to the issuing the *Habeas Corpora*, or *Distringas*. Hence it is that the *Common Pleas* use no *Placita* after the Award of the first *Venire*, when they go to Trial the same Term that the *Issue* is joined, for that would be apparently unnecessary, since this *Placita* came in, instead of these *Continuances*, and in this Case there is none. But in the *King's Bench* they always entered two *Placita's*, one at the top of the *Roll*, and the other after the Award of the *Venire*, though the *Issue* is tried the same Term it is joined; and for this Reason it is certain that antiently the *Continuances* in that Court were from one Day to another in the same Term, and not from Term to Term. And this they still continue to do, though it is seemingly at this Time apparently wrong; for in this Case the second *Placita* is Word for Word with the first, consequently it comes in very abruptly, and can have no Meaning at all in it.

Having said thus much of the *Issue*, and *Venire* awarded thereby, we shall now take a View of the *Record* for Trial, by which the Awards of the *Habeas Corpora* and *Distringas* will appear.

Of making up the *Nisi prius* Roll, or Record.

After the Statute of *Nisi prius* the Clerks in the *King's Bench*, and the Prothonotaries in the *Common Pleas*, used to make up a *Nisi prius* Roll from the *Issue* Roll, and give it to the Attorney under their Seal for Trial. But after

ter Attornies took upon themselves to carry on the Proceedings by Paper Copies, they likewise of course made up the *Issue Roll*, and *Nisi prius Roll* (or Record, as we call it) for Trial, and carrying them both with the Pleadings to the respective Officers, they examined them together; and keeping the *Issue Roll* to file, they passed and sealed up the *Nisi prius Roll*, (which they gave back to the Attorney) as extracted and made up by themselves, being then paid for the several Entries. And so the Record is still supposed to be made up by these respective Officers whose Business it is, and who are to make up the proper Continuances thereon as the Acts of the Court. Now in making up the *Nisi prius Roll*, as these Officers used to do, the same is done in the following Manner.

In the King's Bench.

They first ingross in large Hand a Title thereto called a * *Placita*, *i. e.* Pleas, being the first Word of that Title; then in a new Line is ingrossed the *Issue*, with the Award of the *Venire*, *verbatim*; then is added another

* *Pleas*, *Placita*, are now taken for all Pleadings, Debates, and Trials at Law, and are divided into Pleas of the Crown, and Common Pleas. So *Pleas* here signify Pleas or Debates had before our Lord the King at *Westminster* such a Term; *Pleas* in the *King's Bench* being always supposed to be had before the King himself.

Placita,

An Historical Treatise of a Suit at Law.

* *Placita*; and after this second *Placita*, in a new Line, follows the *Jurata*, being the *Respite* of the Jury, (as supposed to have been summoned by the *Venire*) the *Adjournment* of the Cause, and the *Award* of the *Distringas Juratores*; the *Jurata* being the Act of the Court, grounded on a supposed Default of the Jurors not coming on the *Venire*, viz.

Pleas before our Lord the King at Westminster, of the Term of St. Hilary, in the Year of the Reign of our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. 1765. Roll 25. Lee.

Berkshire, to wit. Be it remembered, that on Wednesday next after eight Days of St. Hilary in this same Term, before our Lord the King at Westminster, came A. B. &c. The Issue, with the Award of the *Venire*, verbatim; then the second *Placita*.

Pleas before our Lord the King at Westminster, of the Term of St. Hilary in the Year of the Reign of our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. 1765.

Berkshire, to wit. The Jury between A. B. Plaintiff, and C. D. Defendant, of a Plea of *Trespass*

* When the Cause is tried the same Term the Issue is joined, the second *Placita*, as here, is Word for Word

*Trespafs on the Case, (as 'tis) is * respited before our Lord the King at Westminster, until † Monday next after fifteen Days from the Day of Easter, (the next Return Day after the*

Word as the first; but if it is not tried the same Term Issue is joined, then the only Difference will be, that the *first Placita* will remain of the same Term Issue was joined of, and the *second* must be of the Term it is tried, changing the Name of the King, if the first should be dead. It has been observed why two *Placita's* are used in this Court; but when it is tried the same Term, that Reason will not hold good now, and it seems to come in very abruptly.

* The Reason of this has been noted before.

† This is the Adjournment-day, or Day in *Bank*, being the first Return-day after the Trial, and consequently the Return-day of the *Distringas*; until *four* Days after which, final Judgment cannot be signed; therefore the Plaintiff makes it returnable as soon as conveniently may be after the Day of Trial; as if it is to be tried at the *Sittings within* Term, then the *Return* may be the first *Return-day* after the *Sittings* in the same Term. But if it is to be tried at the *Sittings after* Term, or at the *Affizes*, then it is usually made *returnable* the first *Return* of the subsequent Term. It may happen that the Cause, for particular Reasons, may be adjourned or put off by Consent, or, &c. and not tried at the Time first mentioned in the *Jurata*; and if in the Country, it may be some Terms after, before it is tried; in which Case, when it is to be brought on again for Trial, the Record must be resealed, the *Nisi prius* Day, and the Return of the *Distringas* must be erased, and the new Day of Trial and Return put in, which must be after the Day of Trial, as before observed. And as for the Terms intervening, between the Award of the first *Venire* and the Return of the *Distringas*, they will be taken Notice of, in entering up the Judgment, by *Continuances* of the first *Venire*, by *Viccomes non misit Breve*,

Trial)

Trial) * unless his Majesty's Justices, assigned to hold the Assizes in the County aforesaid, shall first come on Monday the fifth Day of March, at Reading in the said County, according to the Form of the Statute in that Case made and provided, † for Default of the Jurors because none of them did appear, ‡ therefore let the Sheriff have the Bodies of the said Jurors to make § the said Jury between the Parties aforesaid accordingly, || the same Day is given to the Parties aforesaid at the same Place

* Unless his Majesty's Justices, &c. the Statute of *Nisi prius* is the second of Westminster, 1285; but for *Middlesex* the Statute must be meant to be the 18 Eliz. c. 12. for before that Statute there were no Justices of *Nisi prius* for *Middlesex*; but Causes tried at Westminster, before then, were tried at the Bar.

† For Default of the Jurors, &c. every Cause that is tried at *Nisi prius*, at this Time, is tried through a supposed Default of the Jurors not coming to Westminster on the Return of the *Venire*, where they were summoned to, and is the Ground on which the *Jurata* is founded, for respiting the Jury, and awarding the *Distringas*.

‡ Therefore let &c. imperatively said, the King commanding it.

§ The said (not a) Jury, because they are supposed to be the same Jury as were before summoned, and no others.

|| The same Day is given, &c. it being before observed why a *Dies datus* is added at the End of the *Jurata* in this Court. The *Quære* is, Whether it is necessary or not? and if necessary, why is it omitted in the *Common Pleas*? A *Dies datus* was added to the Award of the *Venire*, because the Defendant was originally *excoinnable* thereon; and if he did not appear, he had a Day of course to appear on the *Distringas*; but if he did not appear on the *Distringas*, the Inquest might be taken by Default, and no other Day could be given him; then why is a *Dies datus* added here?

And

* *And be it known that the King's Writ in this Case upon Record was delivered to the Under-Sheriff of the County aforesaid the twelfth Day of February (the last Day of the Term) in this same Term, before our Lord the King at Westminster, to be executed according to Law at his Peril.*

If it is to be tried in Town, at the Sitzings within, or after Term, you say,

Unless the King's right trusty and well-beloved William Lord Mansfield, his Majesty's Chief Justice, assigned to hold Pleas before the King himself, shall first come on Thursday the Day of February, at Westminster-hall in the said County of Middlesex, according to the Form of the Statute, &c.

And then, *And be it known*, as added for the Assizes, is omitted; but *quære* the Reason for it?

* *And be it known, &c.* the *Disfringas*, being awarded on Default of the Jurors not coming to Westminster on the Return of the *Venire*, is here said to be given the last Day of the same Term, to the Under-sheriff to be executed, &c. If this is a necessary Part of the *Jurata*, why is it omitted, if the Cause is to be tried in Middlesex? Where is the Difference, seeing every Cause that is tried in Middlesex is by *Nisi prius*, as well as in the Country? (excepting Trials at Bar, which is out of the common Way.) And yet in Town Causes this Clause is always directed to be left out, in both Courts, though there seems to be as much Reason for the Use of it in Town as there is for the Country.

Of

Of making up the *Nisi prius* Roll on Record, in the Common Pleas.

The making up the Record in the *Common Pleas* is likewise done after the same Manner with a *Placita* prefixed, proper for this Court, viz.

*Pleas at Westminster, before Sir Charles Pratt, Knt. and his Brethren, Justices of our Lord the King of the * Bench, of the Term of St. Hilary in the Year of the Reign of our Sovereign Lord George the third, &c.*
Roll. Jones.

Berkshire, to wit. C. D. late of W. in the said County, Yeoman, was attached to answer to A. B. of a Plea of *Trespass* upon the Case, &c. And whereupon the said A. by R. B. his Attorney, complains that &c. so on with the *Issue* and the Award of the *Venire*, *verbatim*; after which they leave a Space for a † *second Placita*, if needful, (as on the Change or Death of the Chief Justice; or if the Cause is not tried of the same Term

* *Of the Bench, &c.* in a certain Place according to *Magna Charta*, where *Common Pleas* were to be held by his Majesty's Justices, and therefore called *Justices of the Bench*.

† *Second Placita, &c.* as this *second Placita* came in as a general Entry, instead of the *Continuances* on the *Issue Roll*, and which were thought neither necessary nor expedient to be entered on the *Nisi prius Roll*: So where there was no *Continuance* at all, as when the Cause was tried of the same Term the *Issue* was joined, there was no Occasion for a *second Placita*, unless at the Death or Change of the Chief Justice, &c. Therefore when the Cause is intended to be tried the same Term the *Issue* is joined, there is no *second Placita*, but only a Space left to add it, in case the Cause should not be tried, or in case of the Death or Change of the Chief Justice in the same Term.

mentioned in the first *Placita*, in which Cases only they use a second *Placita*) and after such Space, they enter the *Jurata*, being the Adjournment of the Cause, Respite of the Jury, and Award of the *Habeas Corpora Juratorum*, thus :

Berkshire, to wit. *The Jury between A. B. Plaintiff, and C. D. late of W. in the said County, Yeoman, in a Plea of Trespass on the Case, is respited here until fifteen Days from the Day of Easter, unless his Majesty's Justices, assigned to hold the Assizes in the said County of B. according to the Form of the Statute in that Case made and provided, shall first come on Monday the fifth Day of March, at R. in the said County, for Default of the Jurors because none came; therefore let the Sheriff have the Bodies of the several Persons mentioned in the Pannel annexed to the Writ of Habeas Corpora Juratorum, to him directed, to make a Jury between the said Parties of the Plea aforesaid. * And be it known, that the Justices here in Court, in this same Term, delivered a Writ thereupon to the Under Sheriff of the said County, to be executed in due Form of Law, &c.*

If to be tried in Town at the Sittings, you say,

Unless Sir Charles Pratt, Knight, his Majesty's Chief Justice of the Bench here, assigned to hold Pleas at Westminster, according to the

* *And be it known, &c.* See the Note hereon in the *King's Bench*.

An Historical Treatise of a Suit at Law.

Form of the Statute in that Case made and provided, shall come before on *the*

*Day of February, at Westminster
aforesaid, in the great Hall of Pleas there, commonly called Westminster-hall, in the said County of Middlesex, for Default, &c.*

And then, *And be it known, &c.* is omitted here, as it is in the *King's Bench*.

Respect being had to the Courts the *Distringas* and *Habeas Corpora* are awarded by, and made returnable in, there appears no material Difference in the Awards thereof, any more than there is of the *Venire*. Both contain, in brief, the Substance of the respective Writs; and as the *Venire* in both Courts is the same, except in the Return, so the *Distringas* and *Habeas Corpora* are to one and the same Purpose and Effect, though called by different Names, viz. *Distringas* in the *King's Bench*, from that Word formerly used therein, *Præc. tibi quod Distringas, &c. Jur. Sum. &c.* And *Habeas Corpora* in the *Common Pleas*, from those Words in the Writ, *Præc' tibi quod Habeas Corpora coram Just. &c. Jur. sum, &c.* Both issue on a supposed Default of the Jurors not appearing on the Return of the *Venire*, ('tis said thro' a supposed Default, for in fact originally these Writs were not grounded on a Supposition only, as they are now, but on a real Default;) and therefore the Courts, by virtue of the Statute of *Nisi prius*, adjourned the Cause to a future Day, and gave a Respite to the Jury until then, in order that the Cause should be tried in the proper County before the Justices of *Nisi prius*; for which Purpose these Writs are awarded, thereby commanding the Sheriff to have the Jury before them at *Westminster*,

at the Return thereof, *unless his Majesty's Justices assigned to hold the Assizes, shall first come on such a Day and Place, &c.*

The *Record* is the Sum of the whole Process; therefore fully to dissect and examine every particular Part of it, from the first *Placita* to the *Jurata*, together with the several Matters and Things to which it relates, would afford much Pleasure and Profit to a curious Inquirer, as the same may be done with much more Exactness and Nicety than here is pretended to be, and many Things now unnoticed would be accounted for; and then, those Things which now appear so obscure and unintelligible, might seem to have been one Time material, though they are now become obsolete and unnecessary.

But to go on; the next Thing to be considered in the Suit is the *Jury Processes*, that is, the *Venire*, the *Distringas*, and the *Habeas Corpora*. For this Purpose a View of these Writs in the present printed Forms will be necessary, as in all Probability they are the same in Substance, if not in Form, that they were many hundred Years past. And hence will appear whether any Reason can be assigned why two such Writs, as are now made out to nick with the Occasion, are still necessary; or whether the *Venire* alone may not be made sufficient to bring a Jury together to try a Cause, and fully answer the End of both; so that the Record may be shortened by striking out the *Jurat*. and much Expence saved to the Parties in the Suit.

The Writ in the King's Bench.

GEORGE the Third, &c. to the Sheriff of
Berkshire, Greeting. We command you, that
L you

An Historical Treatise of a Suit at Law.

you * *cause to come before* † *Us at Westminster,*
on § Wednesday next after eight Days of the
Purification of the blessed Virgin Mary, || twelve
free

* *Cause to come, &c.* not by the *Posse Comitatus*, to compel them, but *per bonos Summonitores*, to warn them to come. And here two Things says Lord Coke, are to be observed; first, that the Summoners must be *boni*, i. e. *fide Digni ut Valeant Legitimum Testimonium perhibere, cum inde per Justiciarios fuerunt requisiti*. Secondly, It is spoken in the Plural Number, *per bonos Summonitores*, and therefore there must be two at least.

† *Before Us, &c.* the King, as observed, being supposed to sit in this Court in Person; all Writs returnable therein, are returnable before himself; whereas in the *Common Pleas*, they are made returnable before *his* Justices at *Westminster, &c.*

§ Some Return Day before the Day of Trial. The Writ should be tested the first Day of that Term the Issue is joined of. See under Award of *Venire*.

|| *Twelve, &c.* a Trial by a Jury, and the Number *Twelve* is more ancient than any written Law we have. That it was in Use in the *Saxon* Times, is manifest from the Laws of King *Ethelred*, made at *Vanatinga*, [Vanting, Wanatinge] now *Wantage*, in *Berks*, which speak thus: “*In all Hundreds, let there be Assemblies, and twelve Freemen of the most ancient, together (cum Præposito, in Saxon gerefa) with the Reeve of the Hundred, shall swear not to condemn the Innocent, nor absolve the Guilty.*” The County and Hundred Courts were the Courts wherein Causes between Party and Party were chiefly heard, and determined by a Jury; and the main Reason of the great Silence of a Trial by a Jury, before or in the *Saxons* Time, by our Writers, may be, that the vulgar Purgations [the *Ordales*] were notwithstanding the most usual Means of trying Persons, and especially in criminal Affairs. These were of divers Sorts, and then every where in use; and Sir *Matthew Hale* says, “*That in all the Time of King John the Purgations per Ignem et Aquam, or the Trial by Ordeal, continued, as appears by frequent Entries upon the Rolls. But it seems to have ended with this King, for I do not find it in use in any Time after-wards.*” And *N. B.* Although it be *Twelve* in the

* free and † lawful Men ‡ of the Body of your County, each of whom having || ten Pounds a Year

the Writ, yet by ancient Custom the Sheriff must return 24; so that, in this Case, *Usage* and *ancient Custom* maketh Law.

* *Free, &c.* The Tenure by *Villainage* came in with the *Saxons*; consequently, before then, there could be no such Distinction as between *Free* and *Bondmen*: but afterwards, during the Continuance of that Tenure, *Villains*, being subject to the Wills of their Lords, were not to be put on Juries. So careful was the Law in choosing a *free* Jury, not subject to the Influence of any Person! But since the abolishing that Tenure by Stat. 12 Car. 2. other Constructions are improperly made of this Word *free*, as to be free from Prejudice, Envy, &c.

† *Lawful, &c.* That is Men subject to the Laws of the Land; and therefore not Aliens, nor Outlaws, &c.

‡ *Of the Body, &c.* This was ordered so lately as the 4 & 5 Annæ; before which Time, the Jury used to be awarded from the *Visne* or Neighbourhood, as Town, Parish, or Hundred, &c. and the Reason was, because *Qui Vicinus facti Vicini præsumitur scire*. And then the Writ run, *Homines de Vicineto de W. in Com' tuo*.—But as a Jury was often wanting for Want of *Hundreders*, duly qualified, it was ordered by this Statute that the Jury should be awarded out of the *Body* of the County.

|| *Ten Pounds, &c.* that from their Worth they might be able to bear their Expence, and Loss of Time in their Attendance on the Trial; and not, that *Honesty* and *Justice* were not to be found among the poorer Sort of People. By the Statute of *Westminster* 2. c. 38. it was to be 20s. only. By 21 Ed. 1. 40s. By 35 H. 8. the Form of the Writ is described to be, — *Præcipimus, &c. quod Venire faciās, &c. quorum qualibet habeat 40 Solid', &c. ad minus per quos Rei Veritas, &c.* By 27 El. 41. and by 4 & 5 W. & M. 101. and 61. in *Wales*, as it remains at this Time. But *quære*, if 20s. the 13 E. 1. was not more worth than 101. now?

An Historical Treatise of a Suit at Law.

at the least in Lands, Tenements, or Rents, by whom the Truth of the Matter may be the better known, and who are in no wise of * Kin either to A. B. the Plaintiff, or C. D. the Defendant, to † make a certain Jury of the County between the Parties aforesaid, of a Plea of Trespass on the Case, because as well the said C. D. as the aforesaid A. between whom the Difference is, ‡ have put themselves upon that Jury; and have you there the Names of the Jurors, and this Writ. Witness William Lord Mansfield, at Westminster, the 23d Day of January in the Year of our Reign. Lee.

The Venire in the Common Pleas.

GEORGE, &c. To the Sheriff of Ferkshire, greeting. We command you, that you cause to come before our Justices at Westminster, in eight Days of the Purification of the Blessed Mary, twelve free, &c. who are in no wise of Kin either to A. B. the Plaintiff,

* No wise of Kin, &c. an excellent Care in the Law, both in respect to the Jury and Parties; for the being of Kin would be apt to render their Judgment suspicious of Partiality.

† To make a certain Jury, &c. *ad Recognizandum*. The Words in the Award of the Writ are here rendered to make a certain Jury, because the Jury was some Time called *Recognitores Affize* in Affize.

‡ Have put, &c. i. e. have submitted themselves, and the Matter in Dispute, to their Judgment and Opinion.

or

or C. D. late of W. in your County, Yeoman,
the Defendant, to make, &c. Witness Sir
Charles Pratt, Knt. at Westminster, the 23d
Day of January in the Year of our
Reign. Jones.

The *Venire* in this Court is the very same as
in the *King's Bench* except in the Return, and
the adding the Defendant's Addition to his
Name.

The *Distingas* in the *King's Bench*.

GEORGE, &c. to the Sheriff of B. Greeting.
*We command you, that you distrain the Bodies
of the several Persons named in the * Pannel
hereunto annexed, † Jurors summoned in Our
Court before Us, between A. B. Plaintiff, and*

* Named in the Pannel, &c. 'Till lately the Writ run,
*Præcipimus tibi quod distingas A. B. de, &c. C. D. de—
E. F. de — &c.* naming the whole 24 with their Addi-
tions, as they were named in the Pannel returned on the
Venire; for the Return to the *Venire* was Instructions to
the Attorney to make out the *Distingas* by: but now, as
the like Pannel is returned in both Writs, the Sheriff will
return the *Distingas* without the *Venire*, so as he is paid
for the Returns of both; by which the *Venire* is become al-
most uselefs, and is seldom made out at all in the *King's
Bench*.

† *Jurors summoned, &c.* as supposed by the *Venire*; for
by Stat. Westminster 2. *None shall be put on Juries but such as
were before summoned.* 'Tis well known the Jurors are sum-
moned of course, by the Sheriff, without either Writ, un-
less 'tis a Special Jury.

An Historical Treatise of a Suit at Law.

C. D. Defendant, * by all their Lands and Chattels in your Bailiwick, so that neither they nor any of them do intermeddle therewith, until you shall have other Command from Us in that Behalf, and that you answer Us for the Issues of the same, so that you have their Bodies before us at Westminster, † on next after fifteen Days from the Day of Easter, § or before our Justices assigned to hold the Assizes in your County, if they shall first come on Monday the fifth Day of March at R — in your County, according to the Form of the Statute in that Case made and provided, to make a certain Jury between the said Parties, of a Plea of Trespass on the Case, and to bear their Judgments of many Defaults; || and have you there the Names of the Jurors and this Writ. Witness, &c.

* By all their Lands, &c. It would be a severe Distress on the Jurors, if this Writ was to be executed literally. The *Habeas Corpora* has no such Clause.

† On, &c. The Writ should bear *Teste* on the Return Day of the *Venire*, and be made returnable on some Day after the Trial; if tried at *Nisi prius*, 'tis usually the first Return of the next Term.

§ Or before, &c. This *Nisi prius* Clause is the most material Part of this Writ, and before the 42 of Ed. 3. it used to be inserted in the *Venire*; for, until then, the *Distingas* and *Habeas Corpora* never issued but of Necessity.

|| And have you there the Names, &c. This is omitted in the *Habeas Corpora*, and with good Reason; for their Names having been before returned into Court by the *Venire*, as this Writ itself declares, *Jurors summoned*, &c. therefore this Part seems quite superfluous.

If

If for *Middlesex*, you say,

Or before our trusty and well-beloved W. L. M.
assigned to hold Pleas in Our Court before Us,
if he shall come on the
Day of at Westminster in the
said County.

If for *London*,

At Guildhall of the City of London aforesaid.

**The Habeas Corpora in the Common
Pleas.**

GEORGE, &c. To the Sheriff of B. Greeting.
We command you, that you have before our
Justices at Westminster, in fifteen Days from
the Day of Easter, or before our Justices as-
signed to hold the Assizes in your County, ac-
cording to the Form of the Statute in that Case
made and provided, if on Monday the fifth
Day of March, at R. in your said County, they
shall first come, the Bodies of the several Per-
sons named in the Pannel to this Writ annexed,
being the Jurors summoned in Our Court, be-
fore our Justices at Westminster, between
A. B. Plaintiff, and C. D. late of W. in your
County, Yeoman, Defendant, of a Plea of Tres-
pass on the Case, to make that Jury; and
have you there this Writ. Witness, &c.

If for *Middlesex*, you say,

Or before Our faithful and well-beloved Sir C.
Pratt, Knight, Our Chief Justice of our Court
L 4 of

An Historical Treatise of a Suit at Law.

*of the Bench, appointed according to the Form
of the Statute in that Case made and provided,
if on the Day of
at Westminster in your County, he shall first
come, the Bodies, &c.*

*If on For London,
the Day of
at Guildhall of the City of London aforesaid,
he shall first, &c.*

Though the Tenor and Intent of these two Writs are for one and the same Purpose, that is, to constrain the Jurors to appear, who had before been summoned, and had made Default; yet we see the *Distingas* is more full and compulsory than the *Habeas Corpora*. The *Habeas Corpora* is plain and simple, and yet significant; very concise, and yet full and sufficiently instructive, without any such compulsory Matter as the *Distingas* is stuffed with; as, *Distrain, &c. by all their Lands and Chattels, &c. so that neither they, nor any other for them, do intermeddle therewith, &c. until, &c. and that you answer Us for the Issues of the same, so that, &c.* It may be presumed that the *King's Bench*, instead of taking a Precedent from the *Habeas Corpora*, (wherein the only Difference necessary to have been made would have been the making it returnable *before Us*, instead of *before our Justices*) might think proper to use the same Form in *Civil Cases*, which they before had used in *Criminal*. But without descanting on the Form, let us consider the Use, and see if the same Necessity remains, for using two such Writs for Trial, as there formerly did.

It has been observed, that after the Statute of *Nisi prius*, until the 43 Ed. 3. the *Venire* was the only general Procefs that ifsued to bring in a Jury, and in which the *Nisi prius* Clause was inferted; and if the Parties appeared, they went to Trial thereon. And the Reafons for ufing or introducing the other Writs, were thefe;

First, As the Jury was awarded out of the *Vifne*, it fometimes happened that, for want of Hundredors, a full Jury did not appear; in which Cafe the Jury were obliged by the Writ to appear in *Bank*; but this they feldom did, becaufe no Ifsues were returned on the *Venire*; therefore this was the common Cafe in which the *Distringas* and *Habeas Corpora* ifsued to bring them in. But this Reafon will fail now, becaufe the Jury are awarded out of the Body of the County, and a full Jury feldom fails to * appear.

Secondly, If the Jury appeared at the *Affizes* on the *Venire*, the Defendant might *effoin* himfelf; which if he did, the Jury, as to that Cafe, returned *Re infecta*, and the Cafe was adjourned to *Westminfter*. Now in order to get rid of the Defendant's *Effoin* at *Nisi prius*, they made the *Venire* returnable in the fame Term the *Ifsue* was joined, inftead of the fubfequent Term after the *Affizes*, and then ifsued out the *Distringas* or *Habeas Corpora* returnable the fubfequent Term, with the *Nisi prius* therein; on which the

* And in Cafe they do, they may be fupplied by a *Tales*, as fee *post*.

Defendant had no *Effoin* allowed. (*Vide ante, p. .*) And this almost introduced the formal Manner of making out these two Writs for Trial, even as we do now. This, however, was not the constant Practice, for they sometimes went to Trial on the *Venire*, and only issued out the *Distringas* or *Habeas Corpora*, when it was thought the Defendant would take the Advantage of his Liberty to cast an *Effoin*. But even this is so long ago as upwards of 400 Years since; and the Manner of *essoining*, nay, the Thing itself, is obsolete and forgotten, and can therefore be no Reason why the *Venire* alone is not at present a sufficient Process with the *Nisi prius* therein, to summons a Jury and go to Trial on.

Thirdly, It was complained that the Parties, by not seeing the Pannel before-hand, could not be prepared to make their Challenges; therefore, to remedy this, it was enacted by the 42 Ed. 3. c. 11. (near 400 Years since,) "*That no Inquest but, &c. should be taken by Writ of Nisi prius, before the Names of them that were to pass on the Inquest, should be returned into Court.*" This fully established the two Writs as necessary for Trial; for from hence they could no longer place the *Nisi prius* Clause in the *Venire*, but it was taken out and placed in the *Distringas* and *Habeas Corpora*; and all the Ute that was now made of the *Venire*, was, to get a Pannel of a Jury returned into Court by the Sheriff, on which the *Jury* was said to be *impanelled*; and the Names of the Jury, as returned in the Pannel, were inserted in the *Distringas* and *Habeas Corpora*, and then summoned thereon by the Sheriff.

But

But this Practice having been long difused, the *Venire* is become uselefs, and may or may not be made out in the *King's Bench*. If made out, it is most usually returned together with the *Distringas*, and not before; or if *not* made out at all, the Sheriff makes the same Return by his Pannel to the *Distringas*, and is then paid for *both* Returns at once, whereby the Attorney saves the Profits of the Writ to himself. What Use is made of it in the *Common Pleas*, but to pay the Clerk of the *Habeas Corpora* his Fees? How does the Defendant see the Pannel any Time the sooner, as the Plaintiff has the Possession of it even to the Trial, &c.?

It is very evident the Writ is become meerly formal and uselefs; and therefore if one Writ can be saved, and if every Cause is removed, by Difuse or otherwise, for the Necessity of two Writs, why should not the *Venire* alone (as it originally was and may) be established as the only one for the Sheriff to summon a Jury on, especially as 'tis evident that it is (at least it may be made) a full and instructive Precept for that Purpose? And if so, why should any Thing be retained that is superfluous, and may be spared, and only tends to perplex the Proceedings, and multiply Costs? The Benefits that would arise, by establishing the *Venire* as the only Process necessary, would be, that the Record might be shortened by the Jurat. which would become then unnecessary; the Writ of *Distringas* and *Habeas Corpora*, and the Return thereof saved, (for the Sheriff is now paid for two Returns, though one and the same Pannel serves for both Writs, and though the *Venire* is never made out at
all)

all) and much Expence in every Cause, that is created thereby, would be saved to the Parties.

Of Justices of Assize, and *Nisi prius*.

It has been mentioned that the *County* and *Hundred Courts* were formerly the Courts where-in were heard and determined by a Jury, all Matters of small Concerns between *Subject* and *Subject*. But Actions of a superior Nature, as Actions of * *Assize*, &c. were to be heard and determined in the *King's Courts*, or Courts above. But as Actions of *Assize* always passed by a Jury, and it being difficult and expensive for a Jury out of the County to follow the *King's Courts*, or to attend at *Westminster* after the *Common Pleas* was settled there, it was about 1176 that *Justices in Eyre*, or *Itinerant*, were appointed by a special Commission to go into every County to take *Assizes*, and were therefore called *Justices of Assize*; and after their taking such *Assizes*, the Commissions

* *Assize*, &c. may come from the *French*, *Assis*, and that from *Assideo*, to sit together. In general it signified an Assembly of certain Men with the Justice, sitting together at a certain Place and Time; as the Judges are said to hold their *Assizes* (or Sessions) when they go their Circuits. *Assizes* also signified certain Writs, formerly much in Use in *real Actions*; and it is presumed, were so called from their calling together and authorizing certain Persons to sit thereon: As the Writ of *Assize of Novel disseisin*; of *Mort d'Ancestor*, &c. In such Actions it also signified the Jury, and the Pannel, the Pannel of *Assizes*, &c. St. 6 H. 6. and such Actions, Actions of *Assize*, &c.

were

were
Con
N
Justi
upon
ter,
or C
to th
Jury
in o
Assiz
the S
the S
it is
" Ju
" wh
" dif
" *
" the
" wh
" faic
" no
" Be
" app
" the
" be
" W
" cor
" ri
" tal
" rin
" qu
" int

* P
of Assi

were returned into the Courts above, for a Confirmation of what they had done.

Now as it too frequently happened that these *Justices*, thro' some Difficulty in the Cause, or upon the *Essoin* of the Defendant, or other Matter, adjourned such Causes to the *King's* Courts, or Court at *Westminster*, to be determined there, to the great Inconvenience and Expence of the Jury, and the Parties concerned; therefore, in order to remedy this, and that Actions of *Affize* should be tried in the proper County, the Statute of *Westminster* the second, called the Statute of *Nisi prius*, was made, by which it is enacted, "That from henceforth two
" *Justices* sworn shall be assigned, before
" whom and none other, *Affizes of Novel*
" *disseisin*, &c. shall be taken, and they shall
" * associate unto themselves one or two of
" the discreetest Knights of the Shire, into
" which they shall come, and shall take the
" said *Affizes*, &c. and such Inquisitions shall
" not be determined by any *Justices* of the
" Bench, unless a Day and Place certain be
" appointed in the Shire, in the Presence of
" the Parties. And the Day and Place shall
" be mentioned in a judicial Writ by these
" Words: *Præcipimus tibi quod Venire facias*
" *coram Justiciariis nostris apud Westmonaste-*
" *rium in octabis Sancti Michaelis, nisi talis et*
" *talis, tali Die et Loco, ad Partes illas Vene-*
" *rint, duodecim*, &c. And when such In-
" quests shall be taken, they shall be returned
" into the Bench, and there shall Judgment be

* From hence is derived the Judges *Associate*, and Clerk of *Affize*.

" given

“given, &c.” (This plainly shews the *Nisi prius* Clause was first in the *Venire*.)

This Statute leads us to consider the *Justices* of the *Bench*, and the *Justices ad Capiendas Affizas*, in different Lights; the *Justices* at *Westminster*, as Judges in *Bank*, before whom the Proceedings were to continue to be, until they gave final Judgment on the Matter; the *Justices of Assize*, as Commissioners sent on Purpose (for the Ease of the Parties and Jury) to try the Cause in the County, and make their Return to the *Justices* of the *Bench*, of what was done therein, in order that the *Inquest* found by the Jury might be confirmed by them. And 'tis for this Reason that the *Venire* then, and afterwards the *Habeas Corpora* and *Disfringas*, were made returnable at *Westminster*.

Another Thing to be observed is, that these *Justices ad Capiendas Affizas* were not the *Justices* of the *Bench*; for these had no Power to take *Assizes* before the 8th of R. 2. c. 2. but were enabled thereto by this Statute, from which Time these Commissions *ad Capiendas Affizas* soon came to be enlarged, and were made to contain Commissions of *Nisi prius* and *Gaol-delivery*, &c. and to be executed more regularly, and at certain Times, that is, in *Lent-time* and the *Long Vacation*; these being the most leisure Times for the Judges to go, and the Counsel to attend them in their Circuits.

Another Thing is, that *London* and *Middlesex* were Counties excepted out of these Commissions, by reason the Courts themselves were settled in these Counties; and therefore it was complained of by 18 *Eliz.* c. 2. “That heretofore all *Issues* joined in any of the Courts of “Record at *Westminster*, triable in the County of “*Middlesex*,

“*M*
“of
“be
“br
“Sp
“of
“ce
“wi
“for
“ve
“N
“or
“try
“of
“oth
are r
withi
are t
Venir
issue,
grant
Cour
Th
were
Purpo
at *Ni*
Essoin
Inque
in *Bar*
quest
peared

* By
† Th
Day of
Defend
ment w

" *Middlesex*, have been usually tried at the Bars
 " of the said Courts. And that great Num-
 " bers of Actions have of late Years been
 " brought in the said County of *Middlesex* for
 " Speediness of Trial, &c. by Reason where-
 " of the Judges had been hindered in Pro-
 " ceedings before them, by Demurrer or other-
 " wise, to the Delay of Justice, &c. and there-
 " fore it is enacted, that the Judges of the se-
 " veral Courts, &c. shall or may, as Justices or
 " *Nisi prius* for the said County, within Term,
 " or * four Days after the End of every Term,
 " try all Manner of Issues, &c. and that Writs
 " of *Nisi prius* shall be awarded as for any
 " other County, &c." So that all Issues that
 are now tried at *Westminster*, at the Sittings
 within or after Term, and in every other County,
 are tried as at *Nisi prius*; and not only the
Venire, but a *Distringas* and *Habeas Corpora*
 issue, there being no Trials at Bar but what are
 granted by special Leave of the respective
 Courts, on some great Affair.

The *Nisi prius* Day, and the Day in † *Bank*,
 were esteemed in Law as one Day for some
 Purposes: As if the Defendant made Default
 at *Nisi prius*, and an *insufficient* Protection, or
Essoin, was cast for him, by reason whereof the
 Inquest was not then taken; and if at the Day
 in *Bank* the Protection was *disallowed*, the In-
 quest then past, whether the Defendant ap-
 peared at the Day in *Bank* or not; even as it
 would

* By a late Statute this Time is enlarged.

† The Day in *Bank* in the *Common Pleas*, is the *Essoin*
 Day of the next Term after the *Affizes*, so that if the
 Defendants *Essoin* the *Affizes* was disallowed, judg-
 ment was to be entered up as of the Day in *Bank* or
Essoin

would have done at *Nisi prius*, had no *Effoin* been cast at all for him. Some time after, the Day in *Bank* was taken up in examining the Sufficiency of *Effoins* on the Defendant's Appearance then, &c. from whence 'tis presumed come the *four Days* after the Day in *Bank*, before final Judgment can now be signed on the *Postea*, and which are now allowed for the Defendant to move in *Arrest* of Judgment, or for a *new Trial*, &c.

Of the Trial, Jury, and Tales.

Having spoke of the Jury Processess, we come now to speak of the Jury themselves, and of the Trial by them of the Matter in Issue; which is to find out the Truth thereof according to the Evidence that is given to them by the Witnesses of each Party. Their Oath is, *Well and truly to try the Issue joined between the Parties, and true Verdict give according to the Evidence.* And in giving their *Verdict* they must all agree; for the first Question the Court puts to them, after they have considered of the Matter, and come to offer their Opinion is, *Whether they are all agreed in their Verdict?* To which the Foreman must answer, *Yes*, in the Presence and hearing of them all.

Effoin Day; which is the Reason why Judgments in this Court relate to the *Effoin* Day of the Term; but in the *King's Bench* the Day in *Bank* was the *quatuor Die post*, which they reckoned the *first* Day of the Term, and on which Judgments in this Court were to be entered up, which is the Reason why Judgments in the *King's Bench* relate to the first Day of the Term only, and not to the *Effoin* Day.

A Trial may be said to be two-fold, that is, in *Fact* and in *Law*. First, The *Questio Juris*, or a Trial on Matter of *Law*, is usually tried by the Judges on a Demurrer or special Verdict, &c. Secondly, The *Questio Facti*, or a Trial of *Fact*, is to be tried by a Jury, and not the Judges; for, *ad Questionem Juris respondent Judices, ad Questionem Facti respondent Juratores*.

A Trial by a Jury of so many Friends and Neighbours, as they are esteemed to be, and wherein they must all agree, is one of the fairest Means in the World for obtaining Justice (if not the only one) for any Certainty. And in this Kingdom it is so very ancient, that we find it was practised before any of our written Laws were established. And the *Qualifications* of the Jurymen, as required by the Jury Process, clearly evince how careful the Law was of having Justice done, and that neither Party should be dissatisfied with their Verdict; for, as hath been noted, they were to be,

First, *Liberi et Legales Homines*, whereby all Villains, Outlaws, &c. are excluded.

Secondly, *De Vicineto*, whereby they are presumed to know something of the Fact, &c.

Thirdly, *Quorum qualibet habeat*, &c. where, by having a Freehold of so much a Year, they may, without any Reflection on the poorer Sort, be esteemed to be Men less liable to Corruption, and better able to bear the Trouble and Loss in attending.

Fourthly, *Et qui nec A. B. nec C. D. &c.* whereby all Affinity and Consanguinity to either of the Parties is taken away.

Fifthly, *Ad faciendum quandam Jurat. Patrie*, &c. whereby Peers are excluded from

M

inter-

intermeddling with Matters of the poorer Sort, for they are not *Pares Patriæ*, but *Pares* of an higher Rank.

If either of these Qualifications was found to be wanting, in any or either of them, it was a sufficient Ground for objecting to such a Jurymans passing on the Inquest. And thus it continued until the 35 H. 8. c. 6. but as it too frequently happened that (as the Jury were to be *de Vicineto*) for want of *Hundredors*, duly qualified, a full Jury did not appear; or if they did, were often challenged as being of *Kin* to one or other of the Parties; or in some other Respect not indifferent Men, whereby great Delay and Trouble as well as Expences, were had; therefore, by this Statute, it was enacted, *that the Sheriff should return for the future six of the Jury out of the County, and six out of the Visne; and in case a full Jury did not appear, then the Sheriff was to return a Supply of Men of the County from out of those then in View of the Court, in order that the Cause should not remain untried.* This Statute gave Rise to the *Tales de Circumstantibus*, which was not at Common Law as the Jury was. And hence, if a full Jury did not appear, the Court, at the Prayer of the Party, directed the Sheriff to return a *Tales*; and thereupon the Sheriff returned a sufficient Number of such as were then in View of the Court. These were to be of like Reputation with those impanelled before. By the 4 & 5 of W. & M. these *Tales Men* were to have 5*l* a Year; and by the 7 & 8 of W. 3. they were to be Freeholders or Copyholders of the County. But many Inconveniences still attending the too frequent Delays by Jurors not appearing, or Challenges made to

them
Defic
be ch
was t
Justic
Annæ
shall
which
it fel
pears.

Up
are ca
they
challe
for fu
ficer
until
lengin
was fo

A C
a lega
ception
the A

A C
tion t
nelled
And t
of Par
of the
riff is

* Arr
are rank
one unc
So in co

them, and the Difficulty of supplying such Deficiencies by Persons properly qualified to be chosen upon the *Tales*, a further Remedy was thought necessary, in order to expedite Justice; and this was provided by the 4 & 5 *Annæ*, whereby it is enacted, *that the Venire shall be awarded out of the Body of the County*, which has rendered the *Tales* almost useless, for it seldom happens now but a full Jury appears.

Upon the *Jurors* coming to the Bar, they are called over as named in the *Pannel*; and as they are called, either Party has a Right to challenge them; and if good Cause be shewn for such Challenge, it is allowed, and the Officer proceeds to call the next; and so on, until 12 out of the 24 are sworn. This Challenging the Jury is of common Right, and was formerly frequently used.

A *Challenge* (*Calumnia*, a feigned Word) in a legal Sense, as applied to a Jury, is an Exception against them; and is twofold, *viz.* to the *Array*, and to the *Poll*.

A *Challenge* to the *Array* is a general Exception to all the Persons so * arrayed or impannelled, as well to the *principal* Pannel as the *Tales*. And this was, and is generally done in respect of Partiality, or Default of the Sheriff, and not of the Persons impannelled; as where the Sheriff is of Kin to one of the Parties, &c.

A

* Arrayed or impannelled. The Names of the Jurors are ranked by the Sheriff in a long Strip of Parchment one under another, which Ranking is called the *Array*: So in common speaking we say, Battle Array, for Order

An Historical Treatise of a Suit at Law.

A Challenge to the Poll is an Exception against one or more particular *Jurors*; and this may be *peremptory* or *principal*.

A *peremptory* Challenge is an Exception to any of the Jury, without shewing any Cause; which is only in Cases of *Treason* or *Felony*, in Favour of *Life*. At Common Law a Prisoner could challenge * *thirty-five* peremptorily; but by 38 H. 8. they were reduced to *twenty*, which in *Felony* is still in Force. But by the 1 & 2 W. & M. the Challenge of *thirty-five* in *Treason*, or *Petit Treason*, is restored.

The *principal* Challenge is so called, because, if found true, it is sufficient. And this *principal* Challenge to the *Poll* was reduced to four Heads, viz. *Propter Honoris Respectum*, in Respect of Dignity; as because such a Person was a *Peer* of the Realm, &c. *Propter Defectum*, for some Defect; as because such a Person was an *Alien*, or a *Minor*, or had not a *Freehold*, &c. *Propter Affectum*, as where a Juror was of *Kin* to one of the Parties, or had given a Verdict before in the same Matter, or had been an Arbitrator, or had eat and drank at one of the Party's Costs, &c. *Propter Delictum*; as when a Juror was outlawed, or excommunicated, or had been convicted of *Felony*, &c.

of Battle; and so to array the Jury is to order, or place them in the Pannel; and Pannel signifies no more than a little Part, as a Pannel of a Door, a Pannel of Wainscot, &c. and when this is done, the Jury are said to be impannelled or arrayed.

* By Usage and Custom, the Sheriff is obliged to return 24; however, in general, the *Pannel* contains the Names of 48 Jurors, who are summoned.

The

The *Verdict*, so called from *Vere dictum*, *quasi dictum Veritatis*, is the Judgment or Opinion of the Jury on the Matter, which they give in to the Judge, after having heard the Case, and the Evidence thereon. This they do by their Foreman, and it is then minuted down on the Record by the Judge's *Associate*.

A *Verdict* is either general or special. It is said to be *general* when it is delivered in like general Words with the Issue, as that the Defendant is *Guilty* or *Not Guilty*; or it is said to be *special*, when they find such and such a Thing to be done, declaring the *Facts* as in their Opinion are proved, and praying the Judgment of the Court as to the Law upon those Facts.

Sometimes it happens, that Nobody appears to make any Defence for the *Defendant*; he is then called, and a *Verdict* is given of course for the *Plaintiff*, with such Damages as he can prove to have sustained. On the other Hand, sometimes the *Plaintiff* don't appear; he is then said to be *nonsuited*, and such *Nonsuit* is recorded by the *Associate*, at the Instance of the *Defendant*; and in this Case the *Defendant* is now intitled to his Costs, as he is on every *Nonsuit*, where the *Plaintiff* would have been intitled to Costs in case he had appeared. But a *Nonsuit* is no Bar to a new Action: so there is a Difference between a *Nonsuit* and a *Retraxisit*.

A *Nonsuit* is when the *Plaintiff* is called upon by the Court, and don't appear; and a *Retraxisit* is when the *Plaintiff* is in Court, and declares he will not proceed in his Cause any

further; in which Case the Action is barred for ever.

Sometimes the *Plaintiff*, after he has entered his Cause, (which being called on, and a Jury sworn) will come and withdraw his Record, and thereby suffer a *Nonsuit*; but this don't amount to a *Retraxit*. A *Retraxit* must be in Person, and not by Attorney.

A *Plaintiff*, when he finds himself not sufficiently prepared to go to Trial, (as in case a material *Witness* should be wanting, or some Matter to be given in Evidence is not obtained, &c.) will rather suffer a *Nonsuit* than hazard a Trial; because, should the *Defendant* obtain a Verdict, (unless in Ejectment) the Defendant may plead it in *Bar* to a new Action; but a *Nonsuit*, as is said, is no Bar.

When the *Jury* have given their Verdict, or the *Plaintiff* is *nonsuited*, the *Associate* records the same on the Back of the Record; and if the Cause was tried at the Assizes, afterwards, (*viz.* four Days after the Day in Bank in the next Term) he delivers the same to the Party in whose Favour it is. But when the Cause is tried in Town, the *Associate* delivers the Record, with his Minutes only of the Verdict or *Nonsuit*, indorsed on the Back of the Pannel, immediately to the Attorney; and the Attorney records the Substance thereof on the Back of the Record. This is called the *Postea*, and is the proper Instructions for entering up the Judgment on the *Issue* Roll. It is called the *Postea* from the first Word thereof, for it began, *Postea* Die et Loco, &c. It is the Substance of what was done at the Assizes or *Nisi prius*, as is seen in the following Forms :

A *Postea* at the Assizes for the Plaintiff, where the Defendant makes Default in the King's Bench.

* Afterwards, † on the Day and at the Place within contained before Sir M. F. Knight, one of the Justices of our Lord the King of the Bench, and Esq; one of the Barons of the Exchequer of our said Lord the King, Justices of our said Lord the King assigned to take the Assizes in the said County of B. according to the Form of the Statute in that Case made and provided; the within-named A. B. came by his Attorney within contained, and the within-named C. D. although solemnly demanded, § came not, but made Default

* Afterwards, that is, after the Return of the *Venire*, and the awarding the *Disfringas* or *Habeas Corpora*.

† On the Day and at the Place within contained, &c. i. e. on the Day of *Nisi prius*, and at the Place appointed for holding the Assizes before, &c. came, &c. at which Time the Defendant is called to hear the Names of the Jurors that are to pass on the Inquest.

§ Came not, but made Default. If the Defendant says nothing when the Pannel is called by way of Challenge to the Poll or the Array, the Court proceeds to swear the Jury; and then it is suggested by the Entry of the *Postea*, that the Defendant being solemnly called, came not, but made Default. Therefore it is ordered by the Court, that the Jury be taken or are accepted of by the Court, through his Default in not challenging them. This Default relates to nothing more, for the Defendant and his Attorney might be there ready at the first calling of the Cause; and he loses no Advantage by such a supposed Default, but that

An Historical Treatise of a Suit at Law.

*fault. Therefore let the Jurors of the Jury within mentioned be taken against him by Default; and the Jurors of that Jury being summoned came, who to say the Truth of the within Contents being chosen, tried and sworn, say upon their Oath, that the within-mentioned Writing Obligatory is the Deed of the within-named C. D. as the within-named A. B. has within declared against him; and they * assess the Damages of the within-named A. B. by Occasion of the detaining that Debt, over and above his Costs and Charges by him about his Suit in this Behalf, expended, to and for those Costs to forty Shillings.*

he cannot challenge any of the Jurors after they are sworn. It notwithstanding sounds very strange to hear it alledged that the Defendant *came not, but made Default*, on being called, though he was there, and made none; and that, before a Word about the Jury is spoke. It seems the *Associate* and *Cryer* take each a Fee for such *supposed Default*, and therefore it may be supposed to be thus drawn up to warrant such Fee.

* *And they assess the Damages, &c.* Where the Plaintiff prevails, the Jury always find some Damages that he has sustained, (or else he is nonsuited) which intitles him to his Costs of Suit; such Damages are more or less, as they see Cause for it. A Penny Damages, in some Cases, intitles him to Costs; but in some others he shall have no more Costs than Damages, &c. At Common Law there was neither Damages nor Costs, but if the Plaintiff did not prevail, he was amerced *pro Falso Clamore*; and if he did prevail, then the Defendant was in *Misericordia*, for his unjust Detention of the Plaintiff's Right. And thus it stood till the Statute of Gloucester, Anno 6 E. 1. 1278, whereby Damages and Costs, &c. are given.

The Possea, when in Town, for the Plaintiff, on Default, in the King's Bench.

Afterwards, that is to say, on the Day and at the Place within contained, before Sir William Lee, Knight, the Chief Justice within named, Thomas Owen, Gentleman, being associated unto the said Chief Justice, by Force of the Statute in that Case made and provided, the within-named A. B. came by his Attorney within-contained; and the within-named C. D. although solemnly demanded, came not, but made Default. Therefore let the Jurors, &c. as above.

A Possea at the Assizes for the Plaintiff, on Non Assumpsit, in the Common Pleas.

Afterwards, on the Day and at the Place within contained, the within-named A. B. by his Attorney within-named, came before Sir John Willes, Knight, Chief Justice of our Sovereign Lord the King of his Common Bench, and Sir Knight, one of his said Majesty's Justices of the said Common Bench, Justices of our said Sovereign Lord the King appointed to hold the Assizes for the County of B. and the within-named C. D. although solemnly required, came not there, but made Default. Therefore let the Jury, whereof Mention is within made, be accepted of against him by his Default; whereupon the Jurors summoned

An Historical Treatise of a Suit at Law.

summoned to be upon that Jury came to declare the Truth of the within Contents, and being chosen, tried, and sworn, say upon their Oaths, that the said C. D. did undertake in Manner and Form as the said A. B. within complains against him, and they assess the said A. B. his Damages occasioned by the said within Contents, besides his Expences and Costs laid out by him in this Behalf, to Pounds, *and for his Expences and Costs to forty Shillings.*

A Postea in Town, in the Common Pleas, by Default.

Afterwards, the Day and Place within contained, before Sir Charles Pratt, Knight, Chief Justice within written, having Gentleman, for his Associate, according to the Force of the Statute in such Case made and provided, cometh the within-named A. B. by his Attorney within contained; and the within-written C. D. although solemnly called, cometh not. Therefore let the Jury, &c. as above.

A Postea where the Defendant appears.

Afterwards, at the Day and Place, &c. come as well the within-named A. B. as the within written C. D. by their Attornies within contained, and the Jurors of the Jury, whereof Mention is within made, being summoned, came to declare the Truth of the Matter within contained; and being chosen, tried, and sworn upon their Oaths, say, that, &c.

For

For the Plaintiff, on Nil debet.

— say upon their Oaths, that the within-named C. D. doth owe to the within-named A. B. the 30l. within mentioned, in Manner and Form as the said A. B. within complains against him; and they assess, &c.

For the Plaintiff, in Trespass.

— say upon their Oaths, that the within-named C. D. is guilty of the Premises within-laid to his Charge, in Manner and Form as the said A. B. within complains against him; and they assess the Damages of the said A. B. by Occasion thereof, over and above his Costs and Charges, &c.

For the Plaintiff, in Ejectment.

— say upon their Oaths, that the said C. D. is guilty of the Trespass and Ejectment within-written, in Manner and Form as the said A. B. within complains thereof against him; and they assess the Damages of the said A. B. by Occasion thereof, over and above, &c.

In Ejectment, Guilty as to Part; Not guilty as to the Residue.

— As to the Trespass and Ejectment of one Moiety of the within-written Tenements, they say upon their Oaths, that the said C. D. is guilty

within specified, as the said C. hath by his Pleading within alledged. Therefore,

**One Defendant guilty in Trespas,
others not.**

— *say upon their Oaths, that the said C. D. is guilty of the Trespas within-written, as the said A. B. within complains thereof against him; and they assess Damages, &c. And the said Jury further upon their said Oaths say, that the said E. F. and G. H. are not guilty of that Trespas as the said E. F. and G. H. within by pleading for themselves have alledged. Therefore, &c.*

**For Defendant, an Executor, that his
Testator Nonassumpsit.**

— *say upon their Oaths, that the within-named C. D. (the Testator) did not, in his Life-time, undertake in Manner and Form as the said A. B. hath within declared, &c.*

**Part for Plaintiff, Part for Defendant,
on an Assumpsit.**

— *As to the first and last Promises in the Declaration within mentioned, they say upon their Oaths, that the said C. D. undertook, in Manner and Form as the said A. B. within complains against him; and they assess the Damages of the said A. B. by Occasion thereof, over
and*

and above his Costs and Charges by him about his Suit in this Behalf expended, to Pounds, and for those Costs and Charges to 40s. And as to the Residue of the Promises and Undertakings in the said Declarations also within mentioned, the said Jurors further upon their Oaths say, that the said C. D. did not undertake, in Manner and Form, as the said C. D. within, by pleading for himself, has alledged. Therefore, &c.

For the Defendant, in Trespass, on the Statute of Limitations pleaded.

— *say upon their Oaths, that the said C. D. did not, at any Time within six Years next before the suing out the said Writ, break and enter the House of the said A. nor take and carry away the Goods and Chattels of the said A. within contained, as the said C. has within by pleading alledged.*

The Entry, where the Plaintiff is nonpros'd.

— *And the Jurors of that Jury being summoned, came; who, to say the Truth of the within Contents, were chosen, tried and sworn, and after Evidence being given to them, of and upon the within contained, went from the Bar of this Court to discourse of their Verdict of and upon the Premises; and after the said Jury had discoursed and agreed among themselves, they came back to the said Bar to give their Verdict in this Behalf; upon which the said*

said A. B. being solemnly required came not,
nor did he further prosecute his said Bill against
the said C. D. Therefore, &c.

In the Common Pleas, — Nor did further pro-
secute his said Writ.

**The Entry, where a Juror is with-
drawn.**

— Were chosen, tried and sworn, to declare
the Truth of the within Contents, whereupon
for certain Causes moving as well the said
Justices as the Parties, E. F. one of the Jurors
of the within-mentioned Jury was withdrawn
from the Pannel; and the Residue of the Ju-
rors of that Jury are intirely discharged from
giving any Verdict of and concerning the with-
in-mentioned Premisses, &c.

By these are seen, in general the Forms of
the *Postea's*, either for Plaintiff or Defendant.
They are drawn up in such general Words, as
the *Issues* to which they relate are worded, and
may be with or without the Defendant's De-
fault. They are afterwards continued on the
Issue Roll, for they are the Instructions for en-
tering up the Judgment thereon, which af-
terwards obtain the Name of the *Judgment*
Roll, as see *post.* by which we shall see the
Reason of the formal Beginning of the *Postea*.

Though by the late Act there are now scarce
any Want of common Jurors, yet it may be
proper to add a *Postea* with a *Tales*, to see the
Form thereof, as it may be wanted in *Special*
Juries.

A Postea, with a Tales in Town.

Afterwards, that is to say, on the Day and at the Place within mentioned, before William Lord Mansfield, the Chief Justice within written, there being associated unto him T. O. Gentleman, according to the Form of the Statute in that Case made and provided, came the within-named A. B. by his Attorney within contained, and the within-named C. D. although solemnly required, came not, but made Default. Therefore let the Jury, whereof Mention is within made, be accepted of against him through his Default; and the Jurors of that Jury being summoned, some of them, that is to say, E. F. G. H. I. K. (naming such of them as appear, and are sworn of the Pannel) and because the Residue of the Jurors of the same Jury do not appear, therefore other Persons of those standing by the Court, by the Sheriff of the County aforesaid, at the Request of the said A. and by the Command of the said Chief Justice, are now newly set down, whose Names are affiled in the within-written Pannel, according to the Form of the Statute in that Case made and provided; which said Jurors so newly set down, that is to say, L. M. N. O. P. Q. &c. (naming the Talesmen) being required, came; who, together with the said other Jurors before impannelled and sworn to declare the Truth of the within-Contents, being elected, tried and sworn upon their Oaths declare, that the said C. D. did not undertake in such Manner, &c. as before.

Though

Though it is said that the late Act has rendered the *Tales de Circumstantibus* almost useless, it is spoken with respect to common Juries; but where there is a *special Jury*, it does not always happen that 12 out of the 24 do appear; in which Case it is common to take some from out of the common Jury to add to the Pannel of the special Jury to make up the Number; and in such a Case these common Jurymen are considered as *Tales-men*, viz.

A Postea at the Assizes, with a Tales.

Afterwards, (that is to say) on the Day, in the Year, and at the Place within mentioned, come as well the within-named J. B. Esq; as the within-named W. R. by their Attornies within-named, before Sir Michael Foster, Knight, one of the Justices of our Lord the King assigned to hold Pleas before the King himself, and Sir Sidney Stafford Smythe, Knight, one of the Barons of our said Lord the King of his Court of Exchequer, his Majesty's Justices assigned to hold the Assizes for the within-written County of B. according to the Form of the Statute, &c. And certain of the Jurors of the Jury, whereof Mention is within-made, summoned to be upon that Jury (that is to say) Sir T. H. Knight, J. E. H. H. J. T. and W. B. Esquire, come and on that Jury are sworn; and because the Rest of the Jurors of that Jury do not appear, therefore seven other Persons of the By-standers, being by the Sheriff within written hereunto elected at the Request of the said J. and by the Command of the

N

said

An Historical Treatise of a Suit at Law.

said Sir Michael Foster, are now newly set down, whose names are offiled in the within-written Pannel, according to the Form of the Statute, &c. and which said Jurors, so newly set down, (that is to say) C. G. R. B. F. P. J. W. T. P. J. W. and J. L. Gentlemen, being required, come likewise, and together with the said other Jurors before impannelled, being tried and sworn to speak the Truth of the Matters within contained, upon their Oaths say that the said W. does owe to the said J. the sum of 500 l. specified in the first Count of the within Declaration, being Parcel of the within-mentioned Sum of 1000 l. in Manner and Form as the said J. hath within thereof complained against the said W. And they assess the Damages of the said J. by Reason thereof, besides his Costs and Charges by him about his Suit in this Behalf laid out and expended, to one Shilling, and for his said Costs and Charges to forty Shillings. And the Jurors aforesaid upon their said Oaths further say, that as to the Residue of the said sum of 1000 l. the said W. does not owe the same, or any Part thereof, to the said J. as the said W. hath in pleading within alledged.

N. B. This Action was for Bribery at the Election of a Member for *Abingdon* in *Com. Berks.*

The Judgment.

Therefore it is considered that the said J. B. do recover against the said W. R. his said Debt and Damages by the said Jury in Form aforesaid assessed, and also 1. for his said Costs and

and Charges by the Court of our said Lord the King, now here, adjudged of Increase to the said J. by his Assent, which Damages in the whole amount to six hundred, &c. Pounds; and the said William in Mercy, &c

The *Postea* being ingrossed on the *Back* of the Record, the Party intituled to it, on the Day in *Bank*, (or afterwards) gives a Rule on the *Postea* in the *King's Bench*, called a Rule for Judgment; which Rule is out in four Days, exclusive after the giving it. But till this Rule is expired, final Judgment cannot be signed. These four Days are allowed for the other Party to move in Arrest of the Judgment, or for a new Trial; or he may bring a Writ of Error. And though no such Rule is given in the *Common Pleas*, yet the same Time is allowed there for the same Purposes; and if nothing is done to avoid the Judgment, then the Party, having got the *Postea* stamped with a double Half-crown Stamp, carries the same to the proper Officer, that is, the *Master*, or *Secondary* of the *King's Bench* Office, or the *Prothonotary* in the *Common Pleas*, to tax his Costs thereon. This is called signing the *final* Judgment, and the Costs are called Costs *de incremento*, or *increased* Costs.

Of Costs.

It has been observed, that there was no such Thing as Costs at Common Law, but that, if the Plaintiff did *not* prevail, he was *amerced* for his *false Claim*; and if he *did* prevail, the Defendant was in *Misericordia*, for his unjust

Detention of the Plaintiff's Right. It was called in *Misericordia*, because the *Amerciament* to be imposed was to be but small, and rather less than the Offence, according to *Magna Charta*, c. 14.

These *Amerciaments* were then instead of *Costs*; and though the Use is gone, the Term still remains, for where the Plaintiff or Defendant in the Action fails, the Entry of the Judgment is still *Ideo in Misericordia*, &c. But as this made no Amends to the Plaintiff for the *Costs* he had been out of Pocket, the Statute of *Gloucester* 6 Ed. 1. c. 1. was made, whereby if any Person recovered Damages in a Plea personal or mixed, he should have his *Costs*. This is said to be the Original of *Costs de incremento*, for then the Damages were found by the Jury; and the Court, instead of *Amerciaments*, used to tax the moderate Fees of *Counsel* and *Attornies*.

Thus it stood for the Plaintiff, until the 43 El. c. 6. whereby, if the Plaintiff did not recover in a personal Action (not concerning Freehold nor Assault and Battery) 40 s. he should have no more *Costs* than Damages, unless, &c. The several Statutes relating to *Costs* and Damages are the 6 Ed. 1. c. 1. 6 Ed. 2. c. 14. 3. H. 7. c. 10. 23 H. 8. c. 15. 8 El. c. 2. 18 El. c. 15. 43 El. c. 6. 4 Ja. 1. c. 3. 7 Ja. 1. c. 5. 21 Ja. 1. c. 16. 13 Car. 2. c. 2. 22 & 23 Car. 2. c. 9. 5 & 6 W. & M. c. 12. 8 & 9 W. 3. c. 10. 11 & 12 W. 3. c. 9. 4 & 5 Ann. c. 16, &c.

The awarding of *Costs* was always discretionary in the Court, and formerly the *Puisne* Judge of the Court used to allow the *Costs*, and make a special Rule for the Payment of them; upon the Service whereof, and Refusal of Pay-

Pay
now
refer
Pro
Rule
have
reaso
such
cessa
one
been
fore
be p
Faul
mov
allow
traor
&c.
at th
usua
for f
cessa
And
twee
Atto
W
(whi
of th
said
tered

De

It
Placi

Payment, an *Attachment* used to issue. But now it is become the Course of the Courts to refer the taxing of the *Costs* to the *Secondary* and *Prothonotaries*, and not to make any *special Rules* for such Matters. And these Officers have a discretionary Power to allow what is reasonable, and disallow what is not so; for such *Costs* are only to be allowed as have necessarily occurred in the Prosecution, or where one of the Parties has caused the other to have been at extraordinary Charges. And therefore it has been held that *Costs* ought not to be paid for the putting off a Trial, where no Fault was in the Party against whom it was moved. In like Manner, *no Costs* should be allowed for unreasonable Motions, nor for extraordinary Fees to Counsel, as retaining Fees, &c. nor extraordinary Expences on Witnesses at the Trial, nor paying them beyond what is usually allowed for their Attendance, &c. but for such Expences only as the Party was necessarily put to in the Prosecution of the Suit. And hence arises the Difference in *Costs* between Party and Party, and *Costs* between the Attorney and his Client.

When the *Costs* on the *Possea* are taxed, (which is most frequently done on an Affidavit of the increased *Costs*) final Judgment is then said to be signed, and is then ready to be entered up on the Roll.

Of entering up Judgment on the Roll in the King's Bench.

It has been observed before, that the *second Placita* in the Record for Trial, was a general

An Historical Treatise of a Suit at Law.

Entry made use of to supply the *Continuances* of the *Venire*, even to that *Term* mentioned in that *Placita*, (which was the *Term* of Trial) and served to shew the Court that the Issue was continued to the last *Term*. It was likewise a Warrant to the Officer to continue the *Venire* until then, when he came to enter up the Judgment on the Issue Roll. And this introduced the general formal Beginning with *Postea Continuato inde Processu*, in entering up the Judgment, viz.

— The Issue ends with, *The same Day is given to the Parties aforesaid at the same Place*, then they go on with * *afterwards the Process thereof being continued between the Parties aforesaid, of the Plea aforesaid, by the Jury aforesaid, being respited between them before our Lord the King at Westminster, until* *next after* (the Return of the *Distringas*) † *unless the Justices of our Lord the King, assigned to take the Assizes in the County aforesaid, shall first come on* *the* *Day of* *at* *R. in the said County of B. according to the Form of the Statute in such Case made and provided, † for Default of the Jurors, because*

* *Afterwards the Process, &c.* that is, the Writ of *Venire*.

† If the Cause is tried in Town, it is, *Unless the King's right trusty and well-beloved William Lord Mansfield, his Majesty's Chief Justice assigned to hold Pleas before the King himself, shall first come on* *the* *Day of* *at* *the Guildhall of the City of London, or Westminster-hall, &c.* And then also —

And the said Chief Justice before whom, &c. sent hither his Record, &c.

† *For Default of the Jurors, &c.* This is only a Recital of Part of the Award of the *Distringas*, grounded on a supposed Default of the Jurors not coming on the *Venire*.

none

none of them did appear, † at which Day before our Lord the King at Westminster the aforesaid A. B. comes by the said R. B. his Attorney aforesaid; and the said Justices of our said Lord the King, before whom, &c. sent hither their Record had in these Words, to wit, Afterwards, that is to say, on the || Day and at the Place within contained before — (here comes in the *Postea*, *verbatim*; after which follows the Judgment.) Therefore it is considered that the said A. B. recover against the said C. D. his said Damages, by the said Jury in Form aforesaid assessed; and also (the Costs *de incremento*) for his said Costs and Charges, by the Court of our said Lord the King now here adjudged of Increase to the said A. B. with his Assent, which Damages in the whole amount to And the said C. in Mercy, &c.

If what is before alledged be considered, that is, that anciently the Court of King's Bench had so little to do in Civil Actions, that they had not Business to sit the whole Term, *de Die in Diem*, but adjourned from one Day to another, in the same Term, and gave a Day to the Parties to be present when they did sit. If this, I say, be considered, there will some Reason appear for the Use of a second *Placita*, though the Cause was tried the same Term that the Issue was joined; and likewise for their beginning the Entry of the Judgment on the Roll with *Postea Continuato inde Processu*, &c.

† At which Day, &c. That is, on the Return of the *Distringas*.

|| On the Day and at the Place, &c. The Day and Place of *Nisi prius* mentioned in the *Jurat*, or Award of the *Distringas*.

But at present they both seem, not only unnecessary, but very incoherent; for this Form is now used when there is no Continuance at all, as when the Cause is tried the same Term the *Issue* is joined, in which Case the *Venire* is returned in the same Term, on which very Return Day the *Distringas* is tested. Where then is any Continuance of the Process?

When the Cause is not tried the same Term the *Issue* is joined, then the first *Venire*, awarded by the *Issue*, is continued by *Vicecomes non misit Breve*; and so on in like Manner, from Term to Term, until the *Distringas* issues; and the last *Venire* is continued, as before, by *Postea Continuato*, &c. thus:

— the same Day is given to the Parties aforesaid at the same Place; * at which Day before our Lord the King at Westminster came the Parties aforesaid, by their Attornies aforesaid, and the Sheriff of Berks did not return the said Writ, nor did they do any Thing thereupon; therefore let a Jury come thereupon before our Lord the King at Westminster, on next after (some Return in the Term next after that the first Writ was returnable in) who are in no wise of Kin either to the said A. B. or to the said C. D. to take Cognizance upon their Oath of the whole Truth of the Premises, because as well the said C. D. as the said A. have put themselves upon that Jury; the same Day is given to the Parties aforesaid at the same Place, (if there is to be other Continuances to other Terms, begin again for each) at which Day before our Lord the King at Westminster came the Parties aforesaid, by their

* At which Day, &c. i. e. on the Return Day of the *Venire*.
Attornies;

Attornies aforesaid, and the said Sheriff of B. did not return the said Writ, nor did they do any thing thereupon; therefore, as before, let a Jury come, &c. (to the next Term, and so on from Term to Term, to that wherein the Distringas is returnable.) Afterwards the Process being continued between the Parties aforesaid of the Plea aforesaid, by the Jury being respited between them, before our Lord the King at Westminster, until

next after *unless his*
Majesty's Justices assigned to hold the Assizes in the County aforesaid should first come on Saturday the

Day of
at R. in the said County, according to the Form of the Statute in such Case made and provided, for Default of the Jurors, because none of them did appear; at which Day before our Lord the King at Westminster the aforesaid A. B. comes by the said R. B. his Attorney, and his said Majesty's Justices before whom, &c. sent hither their Record had in these Words, to wit, Afterwards, that is to say, on the Day and in the Year, and at the Place, &c. (the Postea verbatim) therefore it is considered, &c.

Of the Entry of the Judgment on the Roll in the Common Pleas.

The Entry of the Judgment on the Roll in the *Common Pleas* differs in Form from that in the *King's Bench*, though it is the same in Substance. The Reason of this Difference is, that in the *Common Pleas* they allow no Continuance of the Process, when the Cause is tried the same Term the Issue is joined, and for the same

An Historical Treatise of a Suit at Law.

same Reason they use no second *Placita* ; therefore, instead of *Postea Continuato inde Processu*, after the Close of the Issue, they begin more properly thus :

At which Day (i. e. the Return Day of the Venire) the Jury between the Parties aforesaid, in the Plea aforesaid, was respited thereupon between them here until the Morrow of All Souls, (i. e. the Return of the Habeas Corpora) then next following, unless the Justices of our Sovereign Lord the King assigned to take the Assizes in the County aforesaid by Form of the Statute, &c. should first come on the

Day of
then next past, at A. in the County aforesaid ; and now here at this Day, (i. e. the Return Day of the Habeas Corpora above) the said A. B. comes by his Attorney aforesaid, and the said Justices of Assize before whom, &c. sent here their Record in these Words: Afterwards, that is to say, on the Day, &c. (the Postea verbatim) therefore it is considered that the said A. do recover his said Damages against the said C. to *Pounds assessed by the said Jury in Form aforesaid ; and also*

Pounds adjudged by the Court here to the said A. at his Request of Increase for his said Costs and Damages ; which said Damages in the whole amount to *Pounds, and the said C. in Mercy, &c.*

But if the Cause is not tried the Term Issue is joined, then is added a second *Placita* ; and the first *Venire* is continued by *Viccomes non mist Breve* only : after which Continuance they begin as above, *At which Day the Jury, &c.*
 without

without ever any *Postea Continuato*, &c. for that would seem to be a Continuance upon a Continuance.

The Question is, If the Respite of the Jury is a Continuance of the Process, to give some Colour for the Entry by *Postea Continuato*, &c. in the *King's Bench*? If not, we must have Recourse to the former Reason assigned for this Entry, viz. that Continuances in the *King's Bench* were from one Day to another, in the same Term; which Reason will not hold good at this Day, the Continuances being from Term to Term only.

The Entry of the Judgment varies, according to the Judgment that is given, of which the Books of Practice are sufficiently full. However, two Things may be here observed, as they are presumed to have been used before any Costs were given by the Judgment, according to the Stat. 6 E. 1. viz. the *amercing* the Plaintiff for his *false Claim*; and the Defendant for his *unjust Detention* of the Plaintiff's Right, &c. In regard to the first, where the Defendant prevails, the Entry of the Judgment against the Plaintiff is still thus in the *King's Bench*:

*Therefore it is considered that the said A. take nothing by his said Bill, but that he be in Mercy of the Court for his false Clamour, and that the said C. go thereof without Day; * and it is further considered that the said C. recover against the said A. Pounds for his Costs and Charges laid out by him about his*

* This is an Addition to the former Judgment, since the Statute gave Costs.

An Historical Treatise of a Suit at Law.

Defence in this Behalf adjudged to the said C. by the Court of our said Lord the King now here by his own Assent, according to the Statute in such Case made and provided, and that the said C. have Execution thereof.

In the Common Pleas.

*Therefore it is considered that the said A. take nothing by his said Writ, but be in Mercy for his false Clamour thereupon; and that the said C. go thereof without Day, * &c. Also it is considered, &c.*

* See Note
in foregoing
Page.

Sometimes, as in *Repleven, &c.* it is, *That the said A. and his Pledges for prosecuting, are in Mercy, &c.*

In Regard to the second, that is, *amercing the Defendant*, we have seen before the Judgments with respect to it. But in all Actions in both Courts that were *Vi et Armis*, the Judgment against him was with a *Capiatur*, *And that the said C. be taken, &c.* instead of *in misericordia*, because in this Case there was a Fine due to the King; and therefore the Judgment was to be distinguished on every Roll by putting the Word *Mi'a*, or *Capiatur* in the Margin, as is supposed for the more ready finding the *Capiatur Fines*, in order to collect them.

Before the Stat. 16 & 17 Car. 2. the not entering the Words *Mi'a*, or *Capiatur*, or putting one for the other, was Matter of Error.

To all *Fines* Imprisonment was incident; and therefore in Actions *Vi et Armis*, where a Fine was to be set, the Judgment was, *Quod Defendens Capiatur*, that is, *Capiatur quousque Finem fecerit*. But now by the 4 & 5 W. & M.

M. Capiatur Fines in Actions *Vi et Armis* are said to be taken away, and no Judgment ought to be entered with a *Capiatur*. However, the common Form still continues, *And that the said C. be taken, &c.* though there be no Fine set by the Court; the Reason of which is, that instead thereof, the Plaintiff, upon signing the final Judgment in such Actions, is to pay to the Officer 6 s. 8 d. in lieu of the Fine, which 6 s. 8 d. is to be allowed the Plaintiff again in the Costs. And 'tis said, in the *Common Pleas* they enter the Judgments with *Nilil de Fine quia remittitur per Stat'*. So that by this Statute a Fine of 6 s. 8 d. instead of being taken away, is rather rendered certain, and to be paid by the Plaintiff, instead of the Defendant. Whether the Plaintiff ever gets it again, is another Thing!

The *Capiatur* Fine was for a Breach of the public Peace, which every Action *Vi et Armis* implies, and upon such a Record, Process of Outlawry might issue out of the *Crown Office* against the Defendant for the Fine, if not paid; but in Actions upon the Case, &c. where the Plaintiff did not declare with a *Vi et Armis*, there the Defendant was to be *amerced* only, and not *taken* and imprisoned. And this was the Reason of the Difference in the Entries of the Judgments.

Thus much is said to shew to what the formal Parts of the Judgments relate only; to which much more might be added.

The *Judgment* itself is said to be the Voice of the Law. And therefore *Judicium semper pro Veritate accipitur*; and the ancient Words thereof

thereof are very significant, *viz.* *Consideratum est, &c.* thereby implying that the Judgment was given by the Court, upon due Consideration of the Matter before them. And yet, before the Statute of *Jeofails*, and the 4 & 5 *Annæ*, to what a Number of Exceptions, and vexatious Proceedings upon Writs of Error, &c. was a Judgment liable? Especially for Want of Form in the most trifling, unnecessary, and almost insignificant Things imaginable, *viz.* the Want of *Pledges* upon the Bill or Original, the Omission of a *Profert in Curia*, the Omission of *Vi et Armis*, or *Contra Pacem*, or *Hoc paratus est Verificare*, the Want of *Continuances* in the Pleadings, or in the Judgments, &c. &c.

The only Thing to be observed further on this Head, in order to contract the Proceedings, is this, whether a general Entry by *Postea Continuato inde Processu, &c.* in both Courts, where the Cause is not tried the same Term the Issue is joined, but of some subsequent Term, may not be sufficient of itself to continue the *first* Process of *Venire*, awarded at the Close of the Issue to the Term the Judgment thereon be given, (whether or no it be to the next Term, or three or or four Terms after Issue is joined) and thereby supply all those Continuances by *Vicecomes non misit Breve*; or where by *Motion in Arrest of Judgment*, or *Motion for a new Trial*, or by arguing a *special Verdict*, &c. there are *intervening* Terms; if not, it is absolutely necessary every *intervening* Term should be particularly taken Notice of in the Entry of the Judgment, or else there is an Error in the Record; which frequently happens

pens for Want of such Entries, though no Notice be taken of it.

To clear up this Point, and to shew that it may, let us suppose the *Venire* to be to the only Process for summoning a Jury for a Trial. This *Venire* is awarded at the Close of the *Issue* to be returnable the same Term the *Issue* is joined; for Instance, in *Hilary* Term. Now if the Cause is tried upon this Writ with the *Nisi prius* Clause therein, it is *tested* the *first* Day of that Term, and *returnable* the *last*, or some Day *after* the Trial, if in Town; but if for the *Sittings* after Term, or for the *Affizes*, it is *tested* the *last* Day of that Term, and returnable the *first* of *Easter*. And then the Entry of the Judgment may be very properly according to the Form used in the *Common Pleas*, thus: *And now here at this Day (i. e. the Return Day of the Writ) the said A. B. comes by his Attorney aforesaid, and the Justices of Assize before whom, &c. sent here their Record in these Words, Afterwards, that is to say, on the Day and at the Place within contained, &c. (the Poſtea verbatim) therefore it is considered, that—*so on with the Judgment. This is short and plain, and yet full and explicit. But suppose the Cause is to be tried of some *subsequent* Term, for Instance, of *Trinity* Term, then the *Venire* awarded at the Close of the *Issue* need not be made out, but only supposed to have issued, (as it is chiefly now) but a new *Venire* made out for Trial *tested* the *first* of *Trinity*, and returnable the *last*, or some Day *after* the Trial for Town Causes; or *tested* the *last* of *Trinity*, and returnable the *first* of *Michaelmas* Term for the *Affizes*. In which Cases the first *Venire* awarded at the Close of the

An Historical Treatise of a Suit at Law.

Issue may be continued by such a general Entry as *Postea Continuato inde processu, &c.* in entering up the Judgment, viz. *Afterwards the Process being continued between the Parties aforesaid, of the Plea aforesaid, until — (the Return of the Venire made out for the Trial) — at which Day the said A. B. comes by his Attorney aforesaid, and the Justices, &c.* Now if such a general Entry may be allowed to be a Continuance of the first Writ awarded in Hilary Term, it will supply all those Entries on the Roll by *Vicecomes non misit Breve, &c.* from Term to Term, until the entering up of the Judgment, in a very plain and simple Manner. And by this it is evident that the Writs of *Disfringas* and *Habeas Corpora* may be well spared, and then of Consequence there will be no Occasion for the Entry of the *Jurat.* on the Record; and this, I presume, will be agreeable to the original Use of this Writ.

Though the Entry of the final Judgment on the Roll is considered here as the next Proceeding after signing the Judgment, yet this need not be immediately done; for upon signing the Judgment, the Party intitled to the Benefit of it may first bring an Action on his Judgment, or he may have an Execution for the Satisfaction of his Damages, or Debt and Costs, and afterwards enter up his final Judgment to warrant such Action or Execution.

An Action is said to be *Fruetus et Finis Legis*, the Fruit and End of the Suit; for, as observed before, the Execution doth begin after the Action or Suit is ended: and therefore a Treatise of a Suit at Law ought to end here

here with the Judgment. But as there are several Writs of Execution now in Use, it may not be improper to take a slight View of them before we conclude.

Of an Execution.

An Execution is a judicial Writ, grounded on the Judgment of the Court from whence it issues; and is supposed to be granted by the Court, at the Request of the Party at whose Suit it is, to give him Satisfaction on the Judgment which he hath obtained. And therefore an Execution cannot be sued out in one Court, upon a Judgment obtained in another.

There are three Sorts of Executions commonly in Use at this Time, for the obtaining Satisfaction for a Debt, Damages, or Costs given by the Judgment, viz.

A *Capias ad Satisfaciendum* against the Body of the Defendant only;

A *Fieri facias* against the Goods and Chattels of the Defendant only, and

An *Elegit* against the Goods and Chattels, (except Oxen and Beasts of the Plough) and also one half of the Defendant's Lands, to hold by the Plaintiff, until the Debt or Damages and Costs are satisfied.

The *Ca' Sa'* was given by the Statute of *Marlebridge, c. 23.* This Writ, by the Common Law, issued only in *Trespass quare Vi et Armis*; but by the Statute 25 *Ed. 3.* it may issue in other Cases, before which Time we see how tender the Common Law was of restraining a Man's Liberty. And now, indeed, whenever the Body is taken by this Writ, the

O

Plaintiff

Plaintiff can have no other Execution against his Goods and Chattels, Lands or Tenements; for as *Corpus humanum non recipit Æstimationem*, so it is deemed the greatest and highest Satisfaction one Man can have of another. And hence, if a Man died in Custody before the 21 Jac. 1. on this Writ, the Debt was presumed to be satisfied; but by this Statute, c. 24. where a Defendant dies in Custody on this Writ, the Plaintiff, or his Executors and Administrators, by reviving the Judgment, may have a new Execution against his Lands or Goods.

The *Fi' Fa'* was the only Writ of Execution that lay at Common Law, and was afterwards confirmed by the Statute of *Westminster*.

2. If this Writ issues, and the Defendant has not any Goods or Chattels, whereby the Debt and Damages may be levied; or if only Part thereof be levied, the Plaintiff at the Return thereof may have another Writ of Execution, either another *Fi' Fa'*, or a *Ca' Sa'*, or an *Elegit*, for further Satisfaction.

The *Elegit* was given by the Statute of *Westminster* 2. c. 18. If upon this Writ only Goods and Chattels be levied, and those not sufficient to satisfy the Plaintiff's Debts and Damages, the Plaintiff may have another Execution, either a *Ca' Sa'*, or a *Fi' Fa'*, or another *Elegit*, it being in Effect but a *Fi' Fa'*, and the Law is very desirous a Man should have a full Satisfaction on his Judgment.

And yet we can't but observe one very great Hardship that lies on the Plaintiff in this Respect, and that is this: When a Plaintiff has obtained a Judgment for a Debt in Case, &c. on a Trial or Writ of Inquiry, the Costs allowed

allowed on signing final Judgment are up to that Time only, and the Costs of an Execution, and levying the Debt and Costs, are not considered. Therefore, if the Plaintiff takes out an Execution, the *Costs* thereof with the Sheriff's Warrant, the Officer's Fee for taking the Defendant, or taking and keeping Possession of his Goods, the Appraisement and Inventory, the Bill of Sale, and the Sheriff's Poundage, must be all paid out of the Plaintiff's Debt; and this may amount to 40*s.* at the last, and oftener to 3 or 4*l.* which is a great deal out of a Debt of 5 or 6*l.* or out of 20*l.* and must give great Dissatisfaction to a Suitor.

'Tis hard enough for a Man to be forced to take any Remedy at all for a just Debt, and how much more so, if after he has obtained a Judgment for his Debt and Costs, as he imagines, he is still to be put to this further Expence? *I have recovered my Debts and Costs by a Judgment of the Court, and yet am so much out of Pocket!*

The Reason, as presumed, why this is not considered, and allowed for in Costs, on signing the final Judgment, is, because the Court don't know what Remedy the Plaintiff will take on his Judgment; as instead of an Execution he may chuse to bring an Action on it, and then only he can recover his Costs without such Expence. But even then, the Remedy is often worse than the Disease; for if the Defendant can't pay the Costs of one Suit, how can it be expected he should pay the Costs of two?

The Hardship is the same on a Defendant, where he prevails. But in order to remedy this, it is a Pity that the Party is not at Liberty to make his Election, on signing his final Judgment, what Method he will take that the Officer may make an Allowance accordingly.

It is for this Reason that Bonds and Warrants of Attorney to confess Judgment are made in double the Sum, because by recovering the Penalty, these Costs may be taken thereout.

APPENDIX.

A P P E N D I X.

*Of an Issue joined in the Common Pleas in
an Action of Trespass for fishing, &c.*

Cooke.

*Hilary Term in the Thirty-third Year of
the Reign of King George the Second.*

Oxfordshire, } FRANCIS G. late of *Warbo-* Declaration.
to wit. } rough, in the said County,
Yeoman; *William A.* late of the same Place,
Vicualler; *John E.* late of the same Place,
Labourer; *Joseph A.* late of the same Place,
Maltster; and *Samuel H.* late of *Bensington*, in
the said County, Gentleman, were attached
to answer *Edward B.* of a Plea wherefore with
Force and Arms they fished in the free Fishery
of the said *Edward*, in the River *Thames*, at
Shillingford, within the Parish of *Warborough*,
in the said County of *Oxford*, and the Fish of
the Value of twenty Pounds thereout took
and carried away; and also wherefore, with
Force and Arms, they fished in the several
Fishery of the said *Edward* in the River *Thames*
at *Shillingford* aforesaid, within the Parish of
Warborough aforesaid, in the said County of
Oxford, and the Fish of the Value of other
twenty Pounds thereout took and carried away,
and other Wrongs there did to the said *Ed-*
ward, to the great Damage of the said *Ed-*
ward, and against the Peace of our Lord the
present King: And whereupon the said *Ed-*
ward, by *A. B.* his Attorney, complains that

1st Count.

the said *Francis, William, John, Joseph, and Samuel*, on the first Day of *January* in the Year of our Lord one thousand seven hundred and fifty-nine, and on divers other Days and Times between that Day and the twentieth Day of *November* then next following, with Force and Arms fished in the free Fishery of the said *Edward*, in the River *Thames*, at *Shillingford* aforesaid, within the Parish of *Warborough* aforesaid, in the said County of *Oxford*, and the Fish, to wit, one Salmon, twenty Barbels, twenty Jacks, one thousand Perches, one thousand Blays, one thousand Roaches, one thousand Daces, one thousand Gudgeons, and one thousand Eels, of the Value, &c. thereout took and carried away; And also for

2^d Count.

that the said *Francis, William, John, Joseph, and Samuel*, on the said first Day of *January* in the Year aforesaid, and on divers other Days and Times between that Day and the twentieth Day of *November* then next following, with Force and Arms fished in the several Fishery of the said *Edward*, in the River *Thames*, at *Shillingford* aforesaid, within the Parish of *Warborough* aforesaid, in the said County of *Oxford*, and the Fish, to wit, one Salmon, twenty Barbels, twenty Jacks, one thousand Perches, one thousand Blays, one thousand Roaches, one thousand Daces, one thousand Gudgeons, and one thousand Eels, of the Value, &c. thereout took and carried away, and other Wrongs, &c. to the great Damage, &c. and against the Peace, &c. Whereupon the said *Edward* says that he is injured, and hath sustained Damage to the Value of twenty Pounds, and therefore he brings his Suit, &c.

And

And the said *Francis, William, John, Joseph* Plea.
 and *Samuel*, by *R. Boote* their Attorney, come
 and defend the Force and Injury, when, &c.
 and say that they are Not guilty of the Tres-
 passs aforesaid, in Manner and Form as the
 said *Edward* hath above thereof complained
 against them; and of this they put themselves
 on the Country; and the said *Edward* doth so
 likewise; and for further Plea as to the fish-
 ing in the said Fishery in the said *first Count* of
 the said Declaration mentioned, and the said
 Fish in the said *first Count* of the said Decla-
 ration mentioned thereout taking and carrying
 away above supposed to have been committed
 by the said *Francis, William, John, Joseph* and
Samuel, they the said *Francis, William, John,*
Joseph and *Samuel*, by Leave of the Court
 here for this Purpose first had and obtained,
 according to the Form of the Statute in such
 Case made and provided, say, that the said
Edward ought not to have his aforesaid Ac-
 tion thereof against them, because they say
 that the said Fishery in the *first Count* of the
 said Declaration mentioned, and in which, &c.
 is, and at the said several Times when, &c. and
 long before, was a Fishery in and upon a cer-
 tain Piece or Parcel of Land, covered with
 Water, called the River *Thames*, adjoining to
 a certain Close or Piece of Land, called *Bury*
Mead, otherwise *Haseley Mead*, in the Parish
 of *Warborough* aforesaid, and running close by
 the said Close or Piece of Land, called *Bury*
Mead, otherwise *Haseley Mead*, and extending
 in Length the whole Length or Side of the
 said Close or Piece of Land called *Bury Mead*,
 otherwise *Haseley Mead*, next the said River,

and in Breadth from the Bank of the said River next the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, to the Middle of the Stream of the said River; and that the *President and Scholars of Saint John Baptist College* in the University of *Oxford* aforesaid, before the first Time when, &c. and at the said several Times when, &c. were and still are seised in their Demefne as of *Fee* of and in four Acres of Land, with the Appurtenances, lying and being in the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and Parcel thereof; and that they the said President and Scholars, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land, with the Appurtenances, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of the four Acres of Land, with the Appurtenances, Parcel, &c. for the Time being, a *free* Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds above in this Plea particularly mentioned, every Year, at all Times of the Year, at free Will and Pleasure, as belonging and appertaining to their aforesaid four Acres of Land, with the Appurtenances, Parcel, &c. and the said President and Scholars being so seised of and in their aforesaid four Acres of Land, with the Appurtenances, Parcel, &c. they the said President

President and Scholars, before the first Time when, &c. to wit, on the thirtieth Day of *May* in the Year of our Lord one thousand seven hundred and fifty-eight, at *Skillingford* aforesaid in the County aforesaid, by a certain Indenture then there made between the said President and Scholars of the one Part, and one *Richard B.* of the other Part, the one Part of which said Indenture, sealed with the common Seal of the said President and Scholars, they the said *Francis, William, John, Joseph* and *Samuel*, now bring here into Court, the Date whereof is the Day and Year last aforesaid, for the Considerations therein mentioned, did demise and to Farm let unto the said *Richard B.* four Acres of Land, with the Appurtenances amongst other Things, To have and to hold the same unto the said *Richard B.* his Executors, Administrators, and Assigns, from the Feast of the *Annunciation of the Blessed Virgin Mary* then last past, until the End and Term of twenty Years from thenceforth next ensuing and fully to be compleat and ended; by virtue of which said Demise he the said *Richard B.* afterwards and before the first Time when, &c. to wit, on the said thirtieth Day of *May* in the Year of our Lord one thousand seven hundred and fifty-eight, entered into the said four Acres of Land, with the Appurtenances, Parcel, &c. and was, and from thenceforth hitherto hath been, and still is thereof possessed; and being so thereof possessed, they the said *Francis, William, John, Joseph* and *Samuel*, as the Servants of the said *Richard B.* and by his Command at the said several Times when, &c. fished in the said
Fishery

A P P E N D I X.

Fishery above in this Plea particularly mentioned, and in which, &c. as in the *free* Fishery of the said *Richard B.* and the said Fish in the *first* Count of the said Declaration mentioned thereout took and carried away, as they lawfully might, for the Cause aforesaid, which are the said fishing in the said *Fishery* in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, whereof the said *Edward* hath above complained against them, the said *Francis, William, John, Joseph* and *Samuel*; and this they are ready to verify; wherefore they pray Judgment if the said *Edward* ought to have his aforesaid Action thereof against them, &c. and for further Plea as to the fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, above supposed to have been committed by the said *Francis, William, John, Joseph* and *Samuel*, they the said *Francis, William, John, Joseph* and *Samuel*, by like Leave of the Court here for this Purpose first had and obtained, according to the Form of the Statute in such Case made and provided, say, that the said *Edward* ought not to have his aforesaid Action thereof against them, because they say that the said Fishery in the *first* Count of the said Declaration mentioned, and in which, &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon a certain Piece or Parcel of Land, covered with Water, called the River *Thames*, adjoining

adjoining to a certain Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next to the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, unto the Middle of the Stream of the said River; and that the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, before the first Time when, &c. and at the said several Times when, &c. were and still are seised in their Demesne as of Fee, of and in four Acres of Land, with the Appurtenances, lying and being in the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, and Parcel thereof; and that they the said President and Scholars, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said last-mentioned four Acres of Land, with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of the aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. for the Time being, *Common of Fishery* in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds above in this
Plea

A P P E N D I X.

Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to their aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. and the said President and Scholars being so seised of and in the aforesaid last-mentioned four Acres of Land, with the Appurtenances, they the said President and Scholars, before the first Time when, &c. to wit, on the thirtieth Day of *May* in the Year of our Lord one thousand seven hundred and fifty-eight, at *Shillingford* aforesaid in the County aforesaid, by a certain Indenture then and there made between the said President and Scholars of the one Part, and the said *Richard B.* of the other Part, one Part of which said last-mentioned Indenture, sealed with the Common Seal of the said President and Scholars, they the said *Francis, William, John, Joseph* and *Samuel* now bring here into Court, the Date whereof is the Day and Year last aforesaid, for the Consideration therein mentioned, did demise and to Farm lett unto the said *Richard B.* the said last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. to have and to hold the same unto the said *Richard B.* his Executors, Administrators and Assigns, from the Feast of the *Annunciation of the blessed Virgin Mary* then last past, unto the End and Term of twenty Years from thenceforth next ensuing and fully to be compleat and ended; by virtue of which said Demise the said *Richard B.* afterwards, and before the first Time when, &c. to wit, on the said thirtieth Day of *May* in the Year of our Lord one thousand

thousand seven hundred and fifty-eight aforesaid, entered into the said last-mentioned four Acres of Land, with the Appurtenances so demised in Form aforesaid, Parcel, &c. and at the said several Times when, &c. was, and from thenceforth hitherto hath been, and still is thereof possessed; and being so thereof possessed, they the said *Francis, William, John, Joseph* and *Samuel*, as the Servants of the said *Richard B.* and by his Command, at the said several Times when, &c. fished in the said Fishery above in this Plea particularly mentioned, and in which, &c. as in the common Fishery of the said *Richard B.* there; and the said Fish in the *first* Count of the said Declaration mentioned thereout took and carried away, to the Use of the said *Richard B.* using the said Common of Fishery of him the said *Richard B.* as they lawfully might, for the Cause aforesaid, which are the said fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, whereof the said *Edward* hath above complained against them the said *Francis, William, John, Joseph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the said *Edward* ought to have his aforesaid Action thereof against them, &c. and for further Plea, as to the fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, above supposed to have been committed by the said
Francis,

Francis, William, John, Joseph and Samuel, they the said *Francis, William, John, Joseph and Samuel*, by like Leave of the Court here for this Purpose first had and obtained, according to the Form of the Statute in such Case made and provided, say, that the said *Edward* ought not to have his aforesaid Action thereof against them, because they say that the said Fishery in the *first* Count of the said Declaration mentioned, and in which, &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon a certain Piece or Parcel of Land, covered with Water, called the River *Thames*, adjoining to a certain Close or Parcel of Land, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead* next the said River, and in Breadth from the Bank of the said River next to the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, unto the Middle of the Stream of the said River, and which said Fishery above in this Plea particularly mentioned, and in which, &c. is, and at the said several Times when, &c. was the *free* Fishery of the said President and Scholars of *Saint John Baptist College* in the University of *Oxford*; for which Reason they the said *Francis, William, John, Joseph and Samuel*, as the *Servants of the said President* and Scholars, and by their Command, at the said several Times when, &c. fished in the said Fishery

Fishery above in this Plea particularly mentioned, and in which, &c. as in the *free* Fishery of the said President and Scholars; and the said Fish in the *first* Count of the said Declaration mentioned, as the Fish of the said Fishery of them the said President and Scholars, thereout took and carried away, as it was lawful for them to do, for the Cause aforesaid, which are the said fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, whereof the said *Edward* hath above complained against them the said *Francis, William, John, Joseph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the said *Edward* ought to have his aforesaid Action thereof against them, &c. And for further Plea as to fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, above supposed to have been committed by the said *Francis, William, John, Joseph* and *Samuel*, they the said *Francis, William, John, Joseph* and *Samuel*, by Leave of the Court here for this Purpose first had and obtained, according to the Form of the Statute in such Case made and provided, say, that the said *Edward* ought not to have or maintain his aforesaid Action thereof against them, because they say that the said Fishery in the said *second* Count of the said Declaration mentioned, is, and at the said several Times when, &c. and long before, was a Piece or Parcel of Land, covered with Water,

called the River *Thames*, adjoining to a certain Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by and along the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, unto the Middle of the Stream of the said River; and that the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, before the first Time when, &c. and at the said several Times when, &c. were and still are seised in their Demesne as of Fee of and in four Acres of Land, with the Appurtenances, lying and being in the Parish aforesaid, in the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and Parcel thereof; and that they the said President and Scholars, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had for themselves, their Farmers and Tenants of the said last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. for the Time being, a free Fishery in the said River *Thames*, at *Warborough* aforesaid, and within
the

the Limits and Bounds above in this Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging to the said last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. and the said President and Scholars being so seised of and in their aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. they the said President and Scholars, before the first Time when, &c. to wit, on the thirtieth Day of *May* in the Year of our Lord one thousand seven hundred and fifty eight, at *Shillingford* aforesaid in the County aforesaid, by a certain Indenture then and there made between the said President and Scholars of the one Part, and the aforesaid *Richard B.* of the other Part, the one Part of which said last mentioned Indenture, sealed with the common Seal of the said President and Scholars, they the said *Francis, William, John, Joseph* and *Samuel* now bring here into Court, the Date whereof is the same Day and Year last aforesaid, for the Considerations therein mentioned, did demise and to Farm lett unto the said *Richard B.* the said four Acres of Land, with the Appurtenances, Parcel, &c. To have and to hold the same unto the said *Richard B.* his Executors, Administrators and Assigns, from the Feast of the *Annunciation of the Blessed Virgin Mary* then last past, until the End and Term of twenty Years from thence next ensuing and fully to be compleat and ended; by virtue of which said last-mentioned Demise he the said *Richard B.* afterwards, and before the first Time when, &c. to wit, on the said thirtieth

P

Day

Day of *May* in the Year of our Lord one thousand seven hundred and fifty-eight, entered into the said last-mentioned four Acres of Land so demised in Form aforesaid, with the Appurtenances, Parcel, &c. and was and from thenceforth hitherto hath been, and still is thereof possessed; and being so thereof possessed, they the said *Francis, William, John, Joseph* and *Samuel*, as the Servants of the said *Richard B.* and by his Command, at the said several Times when, &c. fished in the said Fishery above in this Plea particularly mentioned, and in which, &c. as in the *free* Fishery of the said *Richard B.* and the said Fish in the *first* Count of the said Declaration mentioned thereout took and carried away as the Fish of the said *Richard B.* coming out of the *free* Fishery of the said *Richard B.* as they lawfully might, for the Cause aforesaid, which are the said fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, whereof the said *Edward* hath complained against them the said *Francis, William, John, Joseph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the said *Edward* ought to have his aforesaid Action thereof against them, &c. And for further Plea as to the fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, above supposed to have been committed by the said *Francis, William, John, Joseph* and *Samuel*,

Samuel, they the said *Francis, William, John, Joseph* and *Samuel*, by like Leave of the Court here for this Purpose first had and obtained, according to the Form of the Statute in such Case made and provided, say, that the said *Edward* ought not to have his afore-said Action thereof against them, because they say that the said Fishery in the said *second* Count of the said Declaration mentioned is, and at the said several Times when, &c. and long before, was a Fishery in and upon a certain Piece or Parcel of Land,* covered with Water, called the River *Thames*, adjoining to a certain Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* afore-said, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next to the said Close or Piece of Land called *Bury Mead*, unto the Middle of the Stream of the said River, and that the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, before the first Time when, &c. and at the said several Times when, &c. were and still are seised in their Demeasne as of Fee of and in four Acres of Land, with the Appurtenances, lying and being in the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and Parcel thereof; and that they the said President and Scholars, and all those whose Estate they now have, and at the said several Times when,

&c. had of and in the said last-mentioned Land; with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of the aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. for the Time being, *Common* of Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds above in this Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to the aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. and the said President and Scholars being so seised of and in their aforesaid last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. they the said President and Scholars, before the first Time when, &c. to wit, on the thirtieth Day of *May* in the Year of our Lord one thousand seven hundred and fifty-eight aforesaid, at *Skillingford* aforesaid in the County aforesaid, by a certain other Indenture then and there made between the said President and Scholars of the one Part, and the said *Richard B.* of the other Part, the one Part of which said last-mentioned Indenture, sealed with the common Seal of the said President and Scholars, they the said *Francis, William, John, Joseph* and *Samuel* now bring here into Court, the Date whereof is the Day and Year last aforesaid, for the Considerations therein mentioned, did demise and to Farm lett unto the said

said *Richard B.* the said four Acres of Land, Parcel, &c. with the Appurtenances, To have and to hold the same unto the said *Richard B.* his Executors, Administrators and Assigns, from the Feast of the *Annunciation of the Blessed Virgin Mary* then last past, unto the End and Term of twenty Years from thenceforth next ensuing and fully to be compleat and ended; by virtue of which said last-mentioned Demise the said *Richard B.* afterwards, and before the first Time when, &c. to wit, on the said thirtieth Day of *May* in the Year of our Lord one thousand seven hundred and fifty-eight aforesaid, entered into the said last-mentioned four Acres of Land, with the Appurtenances, Parcel, &c. so demised in Form aforesaid, and was, and from thenceforth hitherto hath been, and still is thereof possessed, and being so thereof possessed, they the said *Francis, William, John, Joseph and Samuel*, as the Servants of the said *Richard B.* and by his Command at the said several Times when, &c. fished in the said Fishery above in this Plea particularly mentioned, and in which, &c. as in the *Common* Fishery of the said *Richard B.* and the said Fish in the said *second* Count of the said Declaration mentioned thereout took and carried away to the Use of the said *Richard B.* using the said *Common* of Fishery of the said *Richard B.* there, as they lawfully might, for the Cause aforesaid, which are the said fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, whereof the said *Edward* hath

above complained against them the said *Francis, William, John, Joseph* and *Samuel*; and this they are ready to verify; Wherefore they pray Judgment if the said *Edward* ought to have his aforesaid Action thereof against them, &c. and for further Plea as to the fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, above supposed to have been committed by the said *Francis, William, John, Joseph* and *Samuel*, they the said *Francis, William, John, Joseph* and *Samuel*, by like Leave of the Court here for this Purpose first had and obtained, according to the Form of the Statute in such Case made and provided, say, that the said *Edward* ought not to have his aforesaid Action thereof against them, because they say that the said Fishery in the said *second* Count of the said Declaration mentioned, and in which, &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon a certain Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to a certain Close or Parcel of Land called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next to the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, unto the Middle of the Stream of the said

said River, and which said Fishery above in this
 Plea particularly mentioned, and in which,
Ec. is, and at the said several Times, when,
Ec. was the *several* Fishery of the said Pre-
 sident and Scholars of Saint *John Baptist* Col-
 lege in the University of *Oxford*; for which
 Reason they the said *Francis, William, John,*
Joseph and *Samuel*, as the *Servants of the said*
President and Scholars, and by their Com-
 mand at the said several Times when, *Ec.*
 fished in the said Fishery above in this Plea
 particularly mentioned, and in which, *Ec.* as
 in the *several* Fishery of the said President and
 Scholars, and the said Fish in the said *second*
 Count of the said Declaration mentioned as the
 Fish of the said Fishery of them the said Pre-
 sident and Scholars thereout took and carried
 away, as it was lawful for them to do, for the
 Cause aforesaid, which are the said fishing in the
 said Fishery in the said *second* Count of the said
 Declaration mentioned, and the said Fish in the
 said *second* Count of the said Declaration men-
 tioned thereout taking and carrying away,
 whereof the said *Edward* hath above thereof
 complained against them the said *Francis, Wil-*
liam, John, Joseph and *Samuel*, and this they
 are ready to verify; Wherefore they pray Judg-
 ment if the said *Edward* ought to have his
 aforesaid Action thereof against them.

And the said *Edward*, as to the said Plea of
 the said *Francis, William, John, Joseph* and
Samuel, by them secondly above pleaded in
 Bar, as to the fishing in the said Fishery in the
 said *first* Count of the said Declaration men-
 tioned, and the said Fish in the said *first*
 Count of the said Declaration mentioned there-

Replication.

out taking and carrying away, above committed by the said *Francis, William, John, Joseph* and *Samuel*, says that he, by reason of any thing therein alledged, ought not to be barred from having his aforesaid Action thereof against them, because he saith that true it is that the said Fishery in the *first* Count of the said Declaration mentioned, and in which, &c. is and at the said several Times when, &c. and long before, was a Fishery in and upon the said Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the said Close or Piece of Land in the said Plea mentioned, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, to the Middle of the Stream of the said River, as the said *Francis, William, John, Joseph* and *Samuel* have above alledged; but the said *Edward* further saith, That the said *Francis, William, John, Joseph* and *Samuel*, at the said several Times when, &c. of their own *Wrong* fished in the said Fishery of the said *Edward* in the *first* Count in the said Declaration mentioned, and the said Fish in the said *first* Count in the said Declaration mentioned thereout took and carried away in Manner and Form as the said *Edward* hath above thereof complained against them,

them; Without this, that the President and ^{Traverse of} Scholars of Saint *John Baptist* College in the *Ec.* University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, *Ec.* had of and in the said four Acres of Land with the Appurtenances in the said Plea mentioned, Parcel, *Ec.* from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of the said four Acres of Land with the Appurtenances, Parcel, *Ec.* for the Time being, a *free* Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at free Will and Pleasure, as belonging and appertaining to their aforesaid four Acres of Land with the Appurtenances, Parcel, *Ec.* in Manner and Form as the said *Francis, William, John, Joseph* and *Samuel* in their said Plea have above alledged; and this the said *Edward* is ready to verity; Wherefore inasmuch as the said *Francis, William, John, Joseph* and *Samuel* have above acknowledged the committing of that Trespass, the said *Edward* prays Judgment, and his Damages by reason of the committing thereof to be adjudged to him, *Ec.* And the said *Edward*, as to the said Plea of the said *Francis, William, John, Joseph* and *Samuel*, by them thirdly above pleaded in Bar as to the fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration

Declaration mentioned thereout taking and carrying away, above committed by the said *Francis, William, John, Joseph and Samuel*, says, that he, by reason of any Thing therein alledged, ought not to be barred from having his aforesaid Action thereof against them, because he saith, that true it is that the said Fishery in the *first* Count of the said Declaration mentioned, and in which, &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon the said Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the said Close or Piece of Land in the said Plea mentioned, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land, called *Bury Mead*, otherwise *Haseley Mead* next the said River, and in Breadth from the Bank of the said River next the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, unto the Middle of the Stream of the said River, as the said *Francis, William, John, Joseph and Samuel* have above alledged; But the said *Edward* further saith, That the said *Francis, William, John, Joseph and Samuel* at the said several Times when, &c. of their own Wrong, fished in the said Fishery of the said *Edward* in the first Count in the said Declaration mentioned, and the said Fish in the said first Count in the said Declaration mentioned thereout took and carried away in Manner and Form as the said

Edward

Edward hath above thereof complained against *Traverse* of, them; Without this, that the President and *Esc.* Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, *Esc.* had of and in the said four Acres of Land, with the Appurtenances in the said Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of the aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, *Esc.* for the Time being, Common of Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to their aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, *Esc.* in Manner and Form as the said *Francis, William, John, Joseph and Samuel* in their said Plea have above alledged; and this the said *Edward* is ready to verify; Wherefore inasmuch as the said *Francis, William, John, Joseph and Samuel* have above acknowledged the committing of that Trespass, the said *Edward* prays Judgment, and his Damages by reason of the committing thereof to be adjudged to him, *Esc.* And the said *Edward*, as to the said Plea of the said *Francis, William, John, Joseph and Samuel*, by them fourthly above pleaded in Bar as to the fishing in the said Fishery in the said first Count

Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, above committed by the said *Francis, William, John, Joseph* and *Samuel*, says, that he by reason of any thing therein alledged ought not to be barred from having his afore-said Action thereof against them, because he saith that true it is that the said Fishery in the *first* Count of the said Declaration mentioned, and in which &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon the said Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the said Close or Piece of Land in that Plea mentioned, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, unto the Middle of the Stream of the said River, as the said *Francis, William, John, Joseph* and *Samuel* have above alledged; but the said *Edward* further saith, That the said Fishery in the said Plea particularly mentioned in which, &c. is, and at the said several Times when, &c. was the *free* Fishery of the said *Edward*, and not the *free* Fishery of the said President and Scholars of Saint *John Baptist* College in the University of *Oxford*, as the said *Francis, William,*

William, John, Joseph and Samuel have above in their said Plea alledged; and this the 1st Issue join-
 said *Edward* prays may be inquired of by ed by the
 the Country, and the said *Francis, William, plaintiff.*
John, Joseph and Samuel do the same like-
 wise; And the said *Edward* as to the said Plea
 of the said *Francis, William, John, Joseph and*
Samuel by them secondly above pleaded in
 Bar as to fishing in the said Fishery in the
second Count of the said Declaration men-
 tioned, and the said Fish in the said *second*
 Count of the said Declaration mentioned
 thereout taking and carrying away, above com-
 mitted by the said *Francis, William, John,*
Joseph and Samuel, says that he, by reason of
 any thing therein alledged, ought not to be
 barred from having his aforesaid Action there-
 of against them, because he saith that true it
 is that the said Fishery in the said *second* Count
 of the said Declaration mentioned in which,
&c. is, and at the said several Times when,
&c. and long before, was a Fishery in and
 upon the said Piece or Parcel of Land co-
 vered with Water, called the River *Thames*,
 adjoining to the said Close or Piece of Land
 in the said Plea mentioned, called *Bury Mead*,
 otherwise *Haseley Mead*, in the Parish of *War-*
borough aforesaid, and running close by and
 along the said Close or Piece of Land called
Bury Mead, otherwise *Haseley Mead*, and ex-
 tending in Length the whole Length or Side
 of the said Close or Piece of Land called *Bury*
Mead, otherwise *Haseley Mead*, next the said
 River, and in Breadth from the Bank of the
 said River next the said Close or Piece of
 Land called *Bury Mead*, otherwise *Haseley*
Mead, unto the Middle of the Stream of the
 said

Traverse.

said River, as the said *Francis, William, John, Joseph* and *Samuel* have above alledged; but the said *Edward* further saith, That the said *Francis, William, John, Joseph* and *Samuel*, at the said several Times when, &c. of their own Wrong fished in the said Fishery of the said *Edward* in the second Count of the said Declaration mentioned, and the said Fish in the said second Count of the said Declaration mentioned there-out took and carried away in Manner and Form as the said *Edward* hath above thereof complained against them; Without this, that the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land with the Appurtenances in the said Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had for themselves, their Farmers and Tenants of the said last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, a free Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging to the said last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis, William, John, Joseph* and *Samuel* in their said Plea have above alledged; and this the said *Edward* is ready to verify; Wherefore in as much as the said *Francis, William, John, Joseph* and *Samuel*

Samuel have above acknowledged the committing of that Trespass, the said *Edward* prays Judgment, and his Damages by reason of the committing thereof to be adjudged to him, &c. And the said *Edward*, as to the said Plea of the said *Francis, William, John, Joseph* and *Samuel* by them thirdly above pleaded in Bar as to the fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, above committed by the said *Francis, William, John, Joseph* and *Samuel*, says, that he, by reason of any thing therein alledged, ought not to be barred from having his aforesaid Action thereof against them, because he saith that true it is, that the said Fishery in the *second* Count of the said Declaration mentioned, in which, &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon the said Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the said Close or Piece of Land in the said Plea mentioned, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next the said Close or Piece of Land called *Bury Mead*, unto the Middle of the Stream of the said River, as the said *Francis, William, John, Joseph* and

Traverse.

and *Samuel* have above alledged ; But the said *Edward* further saith, that the said *Francis*, *William*, *John*, *Joseph* and *Samuel*, at the said several Times when, &c. of their own *Wrong* fished in the said Fishery of the said *Edward* in the *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned there-out took and carried away in Manner and Form as the said *Edward* hath above thereof complained against them ; Without this, that the said President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said last-mentioned Land, with the Appurtenances in the said Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of the aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, *Common* of Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to the aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis*, *William*, *John*, *Joseph* and *Samuel* in their said Plea have above alledged ; and this the said *Edward* is ready to verify ;

Wherefore

Wherefore in as much as the said *Francis, William, John, Joseph* and *Samuel* have above acknowledged the committing of that Trespass, the said *Edward* prays Judgment, and his Damages by reason of the committing thereof to be adjudged to him, &c. and the said *Edward*, as to the said Plea of the said *Francis, William, John, Joseph* and *Samuel* by them lastly above pleaded in Bar as to the fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, above committed by the said *Francis, William, John, Joseph* and *Samuel*, says that he, by reason of any thing therein alledged, ought not to be barred from having his aforesaid Action thereof against them, because he says that true it is that the said Fishery in the *second* Count of the said Declaration mentioned, and in which, &c. is, and at the said several Times when, &c. and long before, was a Fishery in and upon the said Piece or Parcel of Land covered with Water, called the River *Thames*, adjoining to the said Close or Piece of Land in the said Plea mentioned, called *Bury Mead*, otherwise *Haseley Mead*, in the Parish of *Warborough* aforesaid, and running close by the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, and extending in Length the whole Length or Side of the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, next the said River, and in Breadth from the Bank of the said River next to the said Close or Piece of Land called *Bury Mead*, otherwise *Haseley Mead*, unto the Mid-

Q dle

2d Issue joined by the Plaintiff.

Rejoinder.

dle of the Stream of the said River, as the said *Francis, William, John, Joseph* and *Samuel* have above alledged; but the said *Edward* further saith, That the said Fishery in the said Plea particularly mentioned, in which, &c. is and at the said several Times when, &c. was the several *Fishery of the said Edward*, and not the several *Fishery of the said President and Scholars* of Saint *John Baptist* College in the University of *Oxford*, as the said *Francis, William, John, Joseph* and *Samuel* have above in their said Plea alledged; and this the said *Edward* prays may be inquired of by the Country; and the said *Francis, William, John, Joseph* and *Samuel* do the same likewise.

And the said *Francis, William, John, Joseph* and *Samuel*, as to the said Plea of the said *Edward* by him above pleaded by way of Reply as to their said Plea by them above secondly pleaded in Bar, as to the fishing in the said Fishery in the said first Count of the said Declaration mentioned, and the said Fish in the said first Count of the said Declaration mentioned thereout taking and carrying away, say, as before, That the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land, with the Appurtenances in the said Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants of

of the said four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, a *free* Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to their aforesaid four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis, William, John, Joseph* and *Samuel* have above in their said Plea in that Behalf alledged; and of this they put themselves upon the Country, and the said *Edward* doth so likewise; and the said *Francis, William, John, Joseph* and *Samuel* as to the said Plea of the said *Edward* by him above pleaded by way of Reply as to the said Plea of the said *Francis, William, John, Joseph* and *Samuel*, by them thirdly above pleaded in Bar as to the said fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, say, as before, that the said President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land with the Appurtenances in the said Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their

1st Issue joined by the Defendant.

2d Issue joined by the Plaintiff.

Rejoinder.

dle of the Stream of the said River, as the said *Francis, William, John, Joseph* and *Samuel* have above alledged; but the said *Edward* further saith, That the said Fishery in the said Plea particularly mentioned, in which, &c. is and at the said several Times when, &c. was the several *Fishery of the said Edward*, and not the several *Fishery of the said President and Scholars* of Saint *John Baptist* College in the University of *Oxford*, as the said *Francis, William, John, Joseph* and *Samuel* have above in their said Plea alledged; and this the said *Edward* prays may be inquired of by the Country; and the said *Francis, William, John, Joseph* and *Samuel* do the same likewise.

And the said *Francis, William, John, Joseph* and *Samuel*, as to the said Plea of the said *Edward* by him above pleaded by way of Reply as to their said Plea by them above secondly pleaded in Bar, as to the fishing in the said Fishery in the said first Count of the said Declaration mentioned, and the said Fish in the said first Count of the said Declaration mentioned thereout taking and carrying away, say, as before, That the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land, with the Appurtenances in the said Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their Farmers and Tenants

of

of the said four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, a *free* Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to their aforesaid four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis, William, John, Joseph* and *Samuel* have above in their said Plea in that Behalf alledged; and of this they put themselves upon the Country, and the said *Edward* doth so likewise; and the said *Francis, William, John, Joseph* and *Samuel* as to the said Plea of the said *Edward* by him above pleaded by way of Reply as to the said Plea of the said *Francis, William, John, Joseph* and *Samuel*, by them thirdly above pleaded in Bar as to the said fishing in the said Fishery in the said *first* Count of the said Declaration mentioned, and the said Fish in the said *first* Count of the said Declaration mentioned thereout taking and carrying away, say, as before, that the said President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land with the Appurtenances in the said Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have for themselves, their

1st Issue joined by the Defendant.

3d Issue joined by the Defendants.

Farmers and Tenants of the aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being, *Common* of Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to their aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis, William, John, Joseph* and *Samuel* have in their said Plea alledged; and of this they put themselves upon the Country, and the said *Edward* doth so likewise; And the said *Francis, William, John, Joseph* and *Samuel*, as to the said Plea of the said *Edward* by him above pleaded by way of Reply as to the said Plea of the said *Francis, William, John, Joseph* and *Samuel*, by them secondly above pleaded in Bar, as to the fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said second Count of the said Declaration mentioned thereout taking and carrying away, say, as before, that the President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said four Acres of Land with the Appurtenances in the said Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still

still of Right ought to have for themselves, their Farmers and Tenants of the said last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being a free Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging to the said last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis*, *William*, *John*, *Joseph* and *Samuel* have above in their said Plea in that Behalf alledged; and of this they put themselves upon the Country, and the said *Edward* doth so likewise. And the said *Francis*, *William*, *John*, *Joseph* and *Samuel*, as to the said Plea of the said *Edward* by him above pleaded by way of Reply as to their said Plea by them thirdly above pleaded in Bar, as to the fishing in the said Fishery in the said *second* Count of the said Declaration mentioned, and the said Fish in the said *second* Count of the said Declaration mentioned thereout taking and carrying away, say, as before, That the said President and Scholars of Saint *John Baptist* College in the University of *Oxford*, and all those whose Estate they now have, and at the said several Times when, &c. had of and in the said last mentioned four Acres of Land with the Appurtenances in the said Plea mentioned, Parcel, &c. from Time whereof the Memory of Man is not to the contrary, have had, and have been used and accustomed to have, and of Right ought to have had, and still of Right ought to have

3d issue joined by the Defendants.

4th Issue taken by the Defendants.

Venire awarded.

for themselves, their Farmers and Tenants of the aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. for the Time being *Common* of Fishery in the said River *Thames*, at *Warborough* aforesaid, and within the Limits and Bounds in the said Plea particularly mentioned, every Year, at all Times of the Year, at their free Will and Pleasure, as belonging and appertaining to the aforesaid last-mentioned four Acres of Land with the Appurtenances, Parcel, &c. in Manner and Form as the said *Francis, William, John, Joseph* and *Samuel* have above in their said Plea in that Behalf alledged; and of this they put themselves upon the Country, and the said *Edward* doth so likewise. Therefore, as well to try that Issue as the aforesaid several other Issues between the Parties aforesaid above joined, the Sheriff is commanded that he cause to come here, in eight Days of the *Purification of the blessed Mary*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

Whoever considers the enormous Length of these Pleadings, and the vast Expence that must necessarily have accrued to the Parties by this Means, cannot but wish to see some Reformation in regard to the Manner of prosecuting such Suits, especially for the sake of the Poor, who, how much soever they have Right and Justice on their Side, are for the most Part unable to support the Expence that is necessary to make that Right appear to the Satisfaction of a Court of Judicature.

Is

Is it not monstrous that the mere Chance of having caught a Fish of *two* Shillings Value — the stopping the Course of a trifling Rivulet — the cutting off the Bough of a Tree not worth *Six-pence* — the once riding across a Ground, &c. should give Rise to Pleadings of 100, 150, or 200 Sheets in Length, and occasion an Expence of 150, or 200 *l*? And yet such Sort of Trespasses, or Actions on the Case grounded on such Matters, whereby a Right comes in Question, give Rise to the most extensive and expensive Pleadings, and often end in the Ruin of one or other of the Parties concerned in the Suit.

Where a poor Man happens to be the Defendant in such a Case, it is impossible he should be able to contest such a Suit, without risking the Ruin of himself and his Family, if he should have the Misfortune to fail in his Defence. And indeed, considering the unavoidable Uncertainty that is daily experienced in regard to Decisions upon Matters of this Kind, it would in general be more adviseable for a poor Man in such a Case quietly to yield up his Right, than to contest with a rich and potent Adversary, in Favour of whom the old Adage is too often verified, *viz.* that *Might* overcomes *Right*.

But how poor soever a Man may be, if he has a Right, it is but natural for him to struggle to support it as long as he is able: And how great is the Hardship the Law puts him under, when, in order to do this, it obliges him to engage in such a Labyrinth of tedious and expensive Pleadings!

For notwithstanding it is a Maxim in the Law, that every **Right* has a *Remedy*, yet, in

order to make this Right appear, (upon which the whole Success of the Suit depends) it must necessarily, according to the present Mode of Practice, be set forth in special Pleadings for that Purpose, which Pleadings must likewise be supported by proper Evidence. In the mean Time the Pleadings themselves are liable to many Exceptions, all which must be either guarded against at the first Out-set, or sufficiently answered in the Course of the Suit. The least Omission or Mistake in any of these, how intricate soever they may be, not only gives his Adversary an Advantage over him, but often renders his Suit abortive. And thus, besides the Disappointment, the whole Costs of such a Suit are thrown upon him, and he is perhaps crushed and ruined for ever.

Nor is the Case less hard upon him, even supposing he has the good Fortune to get the better of his Adversary, and succeed in the Suit; for the *extra* Costs, which are not allowed upon a Taxation, and the Client is therefore obliged to pay out of his Pocket, are in such a Suit very considerable, and often amount to more than the Thing in Dispute is worth; and thus the Remedy becomes worse than the Disease.

So that after all, succeed or not succeed, a poor Man in Cases of this Sort, as I observed before, had better quietly yield up his Right, than contest with a powerful and litigious Adversary, who is determined to have his Will, though he tramples on the Rights and Liberties of his Neighbour. What then shall we say to this boasted Maxim of the Law,
which

which the Rich indeed may avail themselves of, but the Poor in many Cases are more likely to be ruined than benefited by ?

Formerly, as has been observed in another Place, a Man could plead but one single Plea, the Law not allowing a Duplicity, much less a Multiplicity of Pleas in the same Cause. Such Plea indeed might be either Special or General; but if a general Plea was thought adviseable, the Defendant could not give every special Matter, how much soever it might tend to support his Right, in Evidence upon the Trial; and if he pleaded one single Plea specially, it too often failed him.

In order to remedy the Inconveniencies arising from this Restriction, the Act of the 4 & 5 *Annæ* was made, whereby, by Leave of the Court, a Man may plead as many several Pleas as his Attorney thinks proper for his Defence. But how much this Liberty is capable of being abused, and the dreadful Consequences that must often result from it with regard to poor People, may be seen by a Review of the foregoing Pleadings, and others more extensive in our Law Books, grounded upon as trivial Circumstances, and cannot but be alarming to every considering and conscientious Man.

Let us see, therefore, if no Remedy for this Evil can be found; an Attempt, I confess, I had no Thoughts before of running into. —

It was the Wish of some Men, above a hundred Years ago, that the *General Issue* might be allowed in all Cases, and that the Special Matter

Matter might be given in Evidence on the Trial; and this seems to be the only Method of redressing the Grievance so long complained of. But it must be granted that under a general Law for this Purpose, many Inconveniences might arise, especially where the Plaintiff does not know what such Special Matter is, by which the Defendant intends to avail himself; in that Case the Plaintiff would undoubtedly lie under great Difficulties to guard against such Evidence. This Inconveniency, however, (as is conceived) might be easily removed.

Every Age gives Light to another, by some new Thing or Method introduced and brought into Practice. With respect to the present Subject, let us take an Example from the Statute of the 2d of *Geo. 2.* with regard to the Allowance of setting off of mutual Debts. This Statute enacts that mutual Debts may be set off one against the other, either by being pleaded in Bar, or given in Evidence on the General Issue, on Notice being given of the particular Sums intended to be set off, and on what Account due, &c. But before the making this Statute, such Debts were to be pleaded specially in Bar; and this new, though late Method of setting off mutual Debts on the General Issue, on giving Notice of such Set-off, was found so beneficial, that by the 8 G. 2. c. 24. it was made perpetual; but without such Notice such Evidence is not to be received.

The Intent of ordering such Notice to be given of the particular Sums intended to be set off on pleading the General Issue, was, that the

the Plaintiff might know the Nature of the Defendant's Claims thereby, and prepare to controvert such Demands of the Defendant, as well as to prove his own.

Now in order to reduce into Practice a similar Method in Actions of *Trespass* and on the *Case*, where a Justification is requisite, let us for Example suppose, that on pleading the General Issue in the foregoing Case, such a Notice as the following had been to be given the Plaintiff of the Special Matter the Defendant intended to give in Evidence on the Trial of the Cause, instead of pleading those Special Matters in that formal Manner in which they appear, *viz.*

Mr. ———, Take Notice that the several Defendants intend to give in Evidence on the Trial of the Issue in this Cause, that the President and Scholars of Saint John the Baptist College in the University of O. are seised in Fee of certain Lands in the Parish of W. in the said County, and being so seised have for themselves, their Farmers and Tenants, a Right to fish in the said Fishery in the Declaration mentioned, at all Times, at their free Will and Pleasure, as belonging to their Lands, &c. and that the said Defendants as their Servants, and by their Command, did fish in the said Fishery in the said Declaration mentioned, and under whom the said Defendants intend to justify their doing the same in Manner, &c. as they lawfully might.

Also that the said President and Scholars, being so seised as above, demised the said Lands whereof, &c. to one Richard B. of the said Parish

Parish of W. and that the said Defendants, as Servants of the said Richard B. and by his Command, did fish in the said Fishery in the said Declaration mentioned, and under whom the said Defendants also intend to justify their doing the same in Manner, &c. as they lawfully might; which said several Rights, or one of them, with such Matters as relate thereto, which shall be necessary and sufficient to justify and defend the said Defendants against the Right and Damages of the Plaintiff, these Defendants shall insist on giving in Evidence on their Behalf, pursuant to, &c. Dated the
Day of 1765.

By such a Notice as this the Plaintiff would have been let into the Knowledge of what the Defendants intended to have availed themselves of, and might have prepared himself therefrom to controvert their Right, by proving his own, by that Grant of the Fishery under which he claimed the Right, to the Exclusion of the Defendants, and those under whom they claimed, with as much Benefit as by their Pleas; for what indeed is the Nature of the Plea itself, but a Notice of a Justification under a certain Right, which the Plaintiff by his Replication denies them to have, and thereby puts that Point in Issue, though in a more formal Manner? Would not the whole Merits of the Cause have come before the Court. on the Trial with an equal Degree of Certainty, and that upon an Issue of a very moderate Length, *i. e.* 10 or 12 Sheets? Would not the Counsel have been as well enabled to have argued on the Merits upon such a Notice, as upon

upon those Special formal Pleadings? Would not the same Evidence have been required to determine the Fact? Would not the Judge and Jury have been capable of hearing and determining upon the Merits as well, if not better? For here a greater Degree of Latitude might have been given to have let in the Parties to the Proof of every Matter tending to shew on whose Side the Merits were, and the Court might have given their Judgment with a greater Degree of Equity, than when tied down to the strict Rules of Pleading, which frequently afford a great Number of Exceptions that are generally taken at the Bar, and much Time is often spent on settling those Points. The same may be said of other Cases of the same Nature; for this is mentioned *Exempli Gratia* only.

How often does it happen, in such Cases, that through one or the other of the Parties failing in their Pleadings to lay hold on some Matter that was necessary, that it proves his Overthrow, when it has been apparent to the Court that the Merits of the Cause were for him: And if so, is this owing to any Defect in the Law itself, which is desirous that every Man should have Justice done him; or is it through the Confinement to that strict Rule, or Mode of pleading which is now practised, and to the many Exceptions such Pleadings are liable to?

Then as to the Reasonableness and Propriety of it, an Example may be drawn from Suits in Ejectment. Every Declaration in Ejectment is grounded on a supposed Trespass, by which a Right or Title comes in Question;

yet.

yet here are no Special Pleadings; nay here by the common Rule the Defendant *must* plead the *General Issue*, and confess the Plaintiff's *Lease* and *Entry*, and the *Ouster* by himself, and insist on his Title only, and the Cause is determined upon the Evidence of a Right or Title, which is produced on the Trial by the one or the other of the Parties, and what is this but giving the Special Matter in Evidence? Why not so in other Actions in Trespass? If the Plaintiff has a Right, ought he not to shew it? If the Defendant has, where is the Reason of his pleading it specially, (which only gives the Plaintiff an Opportunity of taking Exceptions to it) and shall not be allowed to give it in Evidence on the Trial without?

Another Example of the Reasonableness of such a Reformation, may be drawn from the Pleadings in criminal Cases: Here every Defendant is obliged to plead generally *Not guilty* to put himself upon his Country, yet notwithstanding such General Plea, is not every favourable Circumstance that can be alledged for him admitted and received by the Court? Why might not the same Thing be done on an Issue in Fact in Cases of Trespass and on the Case in civil Matters where a Right and Property, &c. is concerned, as well as upon an Indictment?

It may reasonably be imagined that, was this to be allowed, an Attorney, in order to lay hold of every Matter that might be thought advantageous to his Client in such Cases, would be very prolix and copious in drawing such Notices; but to prevent any Degree of Prolixity

lixity, or too great Copiousness thereby, it might be ordered, that the Secondaries or Clerk of the Rules should, from the Attornies Instructions, reduce such Notices into a Rule of Court, in a very concise Manner, with some general Words to let in all relative Matters in the Nature of a Side-Bar Rule; or that, such Instructions should be first signed by Counsel as necessary, and then drawn up into a Rule, which Rule should be served some certain Days before, and the Service proved on the Trial; Copies of such Rules being affixed to the Briefs, would be necessary Instructions for the Counsel to plead from. Here no Room for Exceptions would be given, and however unnecessary some Part of the Rule might be, the Counsel would soon see what really tended to the Merits of the Cause.

It may be objected, that it is impossible to reduce such a Method into general Practice; for in Actions of Covenant, or where an Action is brought against an Executor who has one or more Judgments to plead, (which being Matters of Record must be pleaded specially at large) or Bonds paid, &c. in Discharge of Assets, and such like Cases it cannot be admitted with any Conveniency. In some Cases it may be inconvenient, at least there may be at present an Appearance of some Inconveniences that would arise from it in particular Cases; but all this is no Reason why it may not be allowed and used in Actions of Trespass and on the Case where the Matter will bear it.

However, it is not meant that Special Pleadings should be entirely thrown aside; all that

is

A P P E N D I X.

is contended for, is, that the General Issue, with a Liberty of giving the Special Matter in Evidence upon the Trial, may reasonably and with Propriety be allowed, in such Cases as instanced before, in order to give the poorer Sort of Clients an Opportunity to avail themselves by an easy and cheap Method, rather than by that tedious, perplexed, and expensive one of pleading every Matter specially, in Justification or Bar, as in the foregoing and following Issues.

The following Issue is in Replevin, the Nature of which Action, most of all others, gives Room for long and tedious Pleadings in Matters of as trivial a Concern as the preceding one, as may be easily seen thereby; and the Question is, if such Pleadings cannot be supplied by the like or by some other Method. If so, such a Cause might be tried upon an Issue of 10 or 12 Sheets, instead of one of above 130, as this is.

Though here are two Precedents only given, as very extraordinary ones in such Cases, yet I believe it will be granted by every experienced Practitioner, that these are of a moderate Length, considering the great Number of others most frequently used in Actions of the like Nature.

Hilary

Dickins.

*Hilary Term in the Thirty-third Year of
the Reign of King George the Second.*

Berks. } **T**HOMAS C. and *George D.*
ff. } were summoned to answer *Adam*
Lush of a Plea wherefore they took the Cattle
of the said *Adam Lush*, and unjustly detained
the same against Gages and Pledges, &c. and
whereupon the said *Adam Lush*, by *A. B.* his
Attorney complains, that the said *Thomas* and
George, on the twenty-seventh Day of *Decem-*
ber in the Year of our Lord one thousand
seven hundred and fifty-eight, at the Parish of
Saint *Leonard*, in *W.* in the said County, in a
certain Place there called the *Old Moor*, took
the Cattle, to wit, eight Sheep of the said
Adam Lush, and unjustly detained them against
Gages and Pledges, until, &c. Whereupon
the said *Adam Lush* says that he is injured, and
hath sustained Damage to the Value of twenty
Pounds; and therefore he brings Suit, &c.

And the said *Thomas* and *George*, by *R. B.* Cognizance.
their Attorney, come and defend the Wrong
and Injury when, &c. and as Bailiffs of the
Mayor, Burgeesses and Commonalty of the Bo-
rough of *W.* in the County of *Berks* well
acknowledge the taking of the said eight
Sheep in the said Place, in which, &c. be-
cause they say that the said Place called the
R Old

Old Moor, in which, &c. long before the said Time when, &c. and at the said Time when, &c. was, and still is a certain large Waste or Common Pasture, called and known by the several Names of the *Old Moor*, otherwise *Portman's Moor*, otherwise *Portman's Mead*, containing by Estimation a large Number of Acres, to wit, forty Acres, lying and being at *W.* aforesaid in the County of *Berks* aforesaid, and lying and being within the Manor of *W.* in the County of *Berks* aforesaid, and Parcel of that Manor; and that the said Mayor, Burgeses and Commonalty of the Borough of *W.* aforesaid, long before the said Time when, &c. and at the said Time when, &c. were and still are seised in their Demesne as of Fee of and in the said Manor of *W.* whereof, &c. with the Appurtenances, and being so thereof seised, because that the said eight Sheep at the said Time when, &c. were in the said Place in which, &c. Parcel, &c. eating up, feeding and depasturing on the Grass there then growing, and doing Damage there to the said Mayor, Burgeses and Commonalty of the Borough of *W.* aforesaid, they the said *Thomas* and *George*, as Bailiffs of the said Mayor, Burgeses and Commonalty of the Borough of *W.* aforesaid, well acknowledge the taking of the said eight Sheep in the said Place, in which, &c. and justly, &c. as a Distress for the said Damage so by them there done and doing, &c. and this they are ready to verify; Wherefore they pray Judgment, and a Return of the said eight Sheep, together with their Damages, &c. according to the Form of the Statute in such Case made and provided, to be adjudged to

to t
to
said
and
this
to t
and
gess
in t
taki
in v
Plac
befo
fame
tain
or k
Moo
Port
larg
situa
Cou
May
Boro
Tim
&c.
as of
Past
ces,
the
&c.
eatin
ther
to th
of th
Thom
May

to them, &c. And for further Cognizance as to the taking of the said eight Sheep in the said Declaration mentioned, the said *Thomas* and *George*, by Leave of the Court here for this Purpose first had and obtained, according to the Form of the Statute in such Case made and provided, as Bailiffs of the Mayor, Burgeses and Commonalty of the Borough of *W.* in the County of *Berks*, well acknowledge the taking of the said eight Sheep in the said Place, in which, &c. because they say that the said Place called the *Old Moor* in which, &c. long before the said Time when, &c. and at the same Time when, &c. was and still is a certain large Waste or Common Pasture, called or known by the several Names of the *Old Moor*, otherwise *Portman's Moor*, otherwise *Portman's Mead*, containing by Estimation a large Number of Acres, to wit, forty Acres, situate, lying and being at *W.* aforesaid, in the County of *Berks* aforesaid, and that the said Mayor, Burgeses and Commonalty of the Borough of *W.* aforesaid, long before the said Time when, &c. and at the said Time when, &c. were and still are seised in their Demesne as of Fee of and in the said Waste or Common Pasture in which, &c. with the Appurtenances, and being so thereof seised, because that the said eight Sheep, at the said Time when, &c. were in the said Place in which, &c. eating up, feeding and depasturing on the Grass there then growing, and doing Damage there to the said Mayor, Burgeses and Commonalty of the Borough of *W.* aforesaid, they the said *Thomas* and *George*, as Bailiffs of the said Mayor, Burgeses and Commonalty of the

A P P E N D I X.

Borough of *W.* aforesaid, well acknowledge the taking of the said eight Sheep in the said Place in which, &c. and justly, &c. as a Distress for the said Damage so by them there done and doing, &c. and this they are ready to verify; Wherefore they pray Judgment, and a Return of the said eight Sheep, together with their Damages, &c. according to the Form of the Statute in such Case made and provided, to be adjudged to them, &c.

Plea.

And the said *Adam Lush*, as to the said Cognizance of the said *Thomas* and *George* by them first above made as to the taking of the said eight Sheep of the said Declaration mentioned, says, That they the said *Thomas* and *George*, by reason of any Thing therein alledged, ought not, as Bailiffs of the said Mayor, Burgeesses and Commonalty, to acknowledge the taking of the said eight Sheep in the said Place called the *Old Moor*, in which, &c. to be just, because he says that long before the said Time when, &c. one *William F.* was and yet is seised of the said Place called the *Old Moor*, in which, &c. in the said Parish of Saint *Leonard* in *W.* in his Demesne as of Fee, and being so seised thereof, he the said *William* afterwards, that is to say, on the twentieth Day of *December* in the said Year of our Lord one thousand seven hundred and fifty-eight, at *W.* aforesaid, gave Licence to the said *Adam Lush* to put his Cattle aforesaid into the said Place called the *Old Moor* in which, &c. to depasture the Grass there then growing, by virtue of which Licence the said *Adam Lush* afterwards, and before the said Time when, &c. put the said Cattle into the said Place in which, &c.

&c. to depasture the Grass in the same there
 growing, which said Cattle were in the said
 Place in which, &c. on the Occasion afore-
 said depasturing the Grass there then growing,
 until the said *Thomas* and *George* on the twen-
 ty-seventh Day of *December* in the said Year
 one thousand seven hundred and fifty-eight,
 at the said Parish of Saint *Leonard* in *W.*
 the said Place, in which, &c. took the said
 Cattle of the said *Adam Lush*, and unjustly de-
 tained the same against Gages and Pledges
 until, &c. in Manner and Form as the said
Adam Lush hath above thereof complained
 against them; Without this, that the said Place
 called the *Old Moor* in which, &c. at the said
 Time when, &c. was Parcel of the Manor of
W. in the said Cognizance mentioned, as the
 said *Thomas* and *George* have in their said Cog-
 nizance above alledged; and this the said *Adam*
Lush is ready to verify: Wherefore in as much
 as the said *Thomas* and *George* have above
 acknowledged the taking of the said eight
 Sheep in the said Place called the *Old Moor*
 in which, &c. the said *Adam Lush* prays Judg-
 ment, and his Damages by reason of the tak-
 ing and unjust detaining of the same to be
 adjudged to him, &c. And for further Plea
 in Bar to the said Cognizance of the said *Tho-*
mas and *George* by them first above made as
 to the taking of the said eight Sheep in the
 said Declaration mentioned, the said *Adam*
Lush, by Leave of the Court here to him for
 this Purpose granted, according to the Form
 of the Statute in such Case lately made and
 provided, says, That the said *Thomas* and
George, by reason of any thing therein alledged,

as Bailiffs of the said Mayor, Burgeſſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, &c. to be juſt, becauſe he ſays, that long before, and at the ſaid Time when, &c. one *William F.* was, and ſtill is ſeiſed of and in diverſe, to wit, fifteen Acres of Land, with the Appurtenances, lying and being in a certain Cloſe called *Portman's Field*, otherwiſe *Saint John's Field*, lying at *W.* aforeſaid, in his Demefne as of Fee, and that the ſaid *W. F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *W. F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor*, in which, &c. for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining; and the ſaid *W. F.* being ſo ſeiſed thereof before the ſaid Time when, &c. to wit, on the twentieth Day of *September* in the Year of our Lord one thouſand ſeven hundred
and

and fifty-six, according to the present Stile, at *W.* aforesaid, demised the said fifteen Acres of Land with the Appurtenances (amongst other Things) to one *Job W.* to have and to hold the same to the said *Job W.* from the Feast of Saint *Michael the Archangel* then next ensuing, according to the present Stile, for and during one whole Year thence next following, and so from Year to Year for so long Time as it should please the said *W. F.* and *Job W.* by virtue of which said Demise the said *Job W.* afterwards, and before the said Time when, &c. to wit, on the thirtieth Day of *September* in the Year last aforesaid, according to the present Stile, entered into the said fifteen Acres of Land with the Appurtenances, and became and was possessed thereof, and continued so possessed thereof until and upon the thirtieth Day of *October* in the Year of our Lord one thousand seven hundred and fifty-eight, according to the present Stile, and being so possessed thereof, he the said *Job W.* afterwards, (to wit) on the said thirtieth Day of *October* one thousand seven hundred and fifty-eight, according to the present Stile, at *W.* aforesaid, demised the said fifteen Acres of Land with the Appurtenances to the said *Adam Lush*, to hold the same to him from the Feast of *All Saints*, according to the Old Stile then next ensuing, until the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile, by virtue of which said last-mentioned Demise the said *Adam Lush* afterwards, and before the said Time when, &c. to wit, on the thirteenth Day of *November* in the Year of our Lord one

thousand seven hundred and fifty-eight, entered into the said fifteen Acres of Land with the Appurtenances, and became and was possessed thereof, and being so possessed thereof he the said *Adam Lush*, after the said Feast of *All Saints*, according to the Old Stile in the Year last aforesaid, and before the said Time when, &c. to wit, on the same Day and Year in the said Declaration mentioned, put the said eight Sheep, then being the commonable Sheep of the said *Adam Lush*, and levant and couchant in and upon the said fifteen Acres of Land with the Appurtenances, into the said Place in which, &c. to feed upon the Grass there growing, and to use his said Common of Pasture there, and the said eight Sheep were depasturing in the said Place in which, &c. on that Occasion, as they lawfully might, till the said *Thomas* and *George*, before the Feast of the *Purification of the Blessed Virgin Mary* then next following according to the Old Stile, to wit, at the said Time when, &c. of their own Wrong took the said eight Sheep in the said Place in which, &c. and unjustly detained the same against Gages and Pledges until, &c. in Manner and Form as the said *Adam Lush* hath above thereof complained against them; and this he is ready to verify: Wherefore in as much as the said *Thomas* and *George* have above acknowledged the taking of the said eight Sheep in the said Place in which, &c. the said *Adam Lush* prays Judgment, and his Damages by reason of the taking and unjust detaining of the same to be adjudged to him, &c. And for further Plea in Bar to the said Cognizance of the said *Thomas* and *George* by them first
above

above made as to the taking of the said eight Sheep in the said Declaration mentioned, the said *Adam Lush*, by like Leave of the Court here to him for this Purpose granted, according to the Form of the Statute in such Case lately made and provided, says, That the said *Thomas* and *George*, by reason of any thing therein alledged as Bailiffs of the said Mayor, Burgeffes and Commonalty, ought not to acknowledge the taking of the said eight Sheep in the said Place in which, &c. to be just, because he says, that true it is that the said Place called the *Old Moor* in which, &c. long before, and at the said Time when, &c. was and still is a certain large Waste or Pasture called and known by the several Names of the *Old Moor*, otherwise *Portman's Moor*, otherwise *Portman's Mead*, containing by Estimation a large Number of Acres to wit, forty Acres lying and being at *W.* aforesaid in the County of *Berks* aforesaid, as the said *Thomas* and *George* have in their said Cognizance above alledged; But the said *Adam Lush* further says, That long before, and at the said Time when, &c. one *W. F.* was, and still is seised of and in a certain Messuage and diverse, to wit, one hundred Acres of Land with the Appurtenances, situate, lying and being at *W.* aforesaid, in his Demesne as of Fee, and that the said *W. F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said Messuage and Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and the said *W. F.* still of Right ought to

to have for himself and themselves, his and their Farmers and Tenants of the said Messuage and Land with the Appurtenances, the sole and separate Pasture of the said Place in which, &c. every Year from the Feast of *All Saints* according to the Old Stile, until the Feast of the *Purification of the Blessed Virgin Mary*, according to the same Stile then next following, to be had and taken with Sheep as to the said Messuage and Land with the Appurtenances belonging and appertaining; and the said *W. F.* being so seised of the said Messuage and Land with the Appurtenances, afterwards, and before the said Time when, &c. to wit, on the twentieth Day of *September* in the Year of our Lord one thousand seven hundred and fifty-six, according to the present Stile, at *W.* aforesaid, demised the said Messuage and Land with the Appurtenances to one *Job W.* to hold the same to him from the Feast of *Saint Michael the Archangel* then next following, according to the present Stile, for one whole Year then next to come, and so from Year to Year for so long Time as it should please the said *W. F.* and *Job W.* by virtue of which said Demise the said *Job W.* afterwards, and after the Feast of *Saint Michael the Archangel* in the Year of our Lord one thousand seven hundred and fifty-six, according to the present Stile, and before the said Time when, &c. (to wit) on the thirtieth Day of *September* in the Year last aforesaid, according to the present Stile, at *W.* aforesaid, entered into the said Messuage and Land with the Appurtenances, and became and was, and continually from thenceforth hitherto hath been,

been, and still is possessed thereof, and being so possessed thereof, he the said *Job W.* afterwards, and before the said Time when, &c. (to wit) on the twentieth Day of *December* in the Year of our Lord one thousand seven hundred and fifty-eight, according to the present Stile, at *W.* aforesaid, gave Leave and Licence to the said *Adam Lush* to put the said eight Sheep into the said Place in which, &c. to feed upon the Grass there growing, by virtue of which said Licence the said *Adam Lush* afterwards, and after the Feast of *All Saints* in that Year, according to the Old Stile, and before the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile, and before the said Time when, &c. (to wit) on the Day and Year in the said Declaration mentioned, put the said eight Sheep into the said Place in which, &c. to feed upon the Grass there growing, and the said eight Sheep were depasturing in the said Place in which, &c. on that Occasion, as they lawfully might, till the said *Thomas* and *George* at the said Time when, &c. of their own Wrong took the said eight Sheep in the said Place in which, &c. and unjustly detained the same against Gages and Pledges until, &c. in Manner and Form as the said *Adam Lush* hath above thereof complained against them; and this he is ready to verify: Wherefore in as much as the said *Thomas* and *George* have above acknowledged the taking of the said eight Sheep in the said Place in which, &c. the said *Adam Lush* prays Judgment, and his Damages by reason of the taking and unjust detaining of the same to be adjudged to him,
&c.

&c. And the said *Adam Lush*, as to the said Cognizance of the said *Thomas* and *George* by them lastly above made as to the taking of the said eight Sheep in the said Declaration mentioned, says, That they the said *Thomas* and *George*, by reason of any thing therein alledged, ought not, as Bailiffs of the said Mayor, Burgeses and Commonalty, to acknowledge the taking of the said eight Sheep in the said Place called the *Old Moor* in which, &c. to be just, because he says, that long before, and at the said Time when, &c. one *W. F.* was, and still is seised of and in the said Place called the *Old Moor* in which, &c. in his Demesne as of Fee, and being so seised thereof he the said *William* afterwards, that is to say, on the twentieth Day of *December* in the said Year of our Lord one thousand seven hundred and fifty-eight, at *W.* afore said, gave Licence to the said *Adam Lush* to put his Cattle afore said into the said Place called the *Old Moor*, in which, &c. to depasture the Grass there then growing, by virtue of which Licence the said *Adam Lush* afterwards, and before the said Time when, &c. put the said Cattle into the said Place in which, &c. to depasture the Grass in the same there growing, which said Cattle were in the said Place in which, &c. on the Occasion afore said depasturing the Grass there then growing, until the said *Thomas* and *George*, on the twenty-seventh Day of *December* in the said Year one thousand seven hundred and fifty-eight, at the said Parish of saint *Leonard* in *W.* in the said Place in which, &c. took the said Cattle of the said *Adam Lush*, and unjustly detained the same
 against

against Gages and Pledges until, &c. in Manner and Form as the said *Adam Lush* hath above thereof complained against them; Without this, that the said Mayor, Burgesſes and Commonalty of the Borough of *W.* aforeſaid, at the ſaid Time when, &c. were ſeiſed in their Demefne as of Fee of and in the ſaid Waſte or Common Paſture called the *Old Moor*, in which, &c. as the ſaid *Thomas and George* have in their ſaid Cognizance above alledged; and this the ſaid *Adam Lush* is ready to verify: Wherefore in as much as the ſaid *Thomas and George* have above acknowledged the taking of the ſaid eight Sheep in the ſaid Place called the *Old Moor*, in which, &c. the ſaid *Adam Lush* prays Judgment, and his Damages by reaſon of the taking and unjuſt detaining of the ſame to be adjudged to him, &c. And for further Plea in Bar to the ſaid Cognizance of the ſaid *Thomas and George* by them laſtly above made as to the taking of the ſaid eight Sheep in the ſaid Declaration mentioned, the ſaid *Adam Lush* by Leave of the Court here to him for this Purpoſe granted, according to the Form of the Statute in ſuch Caſe lately made and provided, ſays, That the ſaid *Thomas and George*, by reaſon of any thing therein alledged, as Bailiffs of the ſaid Mayor, Burgesſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, &c. to be juſt, becauſe he ſays, that long before, and at the ſaid Time when, &c. one *William F.* was, and ſtill is ſeiſed of and in diſerſe (to wit) fifteen Acres of Land with the Appurtenances, lying and being in a certain Cloſe called *Portman's Field*,
otherwise

otherwise Saint *John's Field*, lying at *W.* afore-said, in his Demesne as of Fee, and that the said *William F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and the said *William F.* still of Right ought to have for himself and themselves, his and their Farmers and Tenants, Occupiers of the said fifteen Acres of Land with the Appurtenances, Common of Pasture in and upon the said Place called the *Old Moor*, in which, &c. for all his and their commonable Sheep levant and couchant upon the said fifteen Acres of Land with the Appurtenances, every Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile, as to the said fifteen Acres of Land with the Appurtenances belonging and appertaining; and the said *William F.* being so seised thereof before the said Time when, &c. (to wit) on the twentieth Day of *September* in the Year of our Lord one thousand seven hundred and fifty-six, according to the present Stile, at *W.* afore-said, demised the said fifteen Acres of Land with the Appurtenances (amongst other Things) to one *Job W.* to have and to hold the same to the said *Job W.* from the Feast of Saint *Michael the Archangel* then next ensuing, according to the present Stile, for and during one whole Year thence next following, and so from Year to Year for so long Time as it should please

please the said *William F.* and *Job W.* by virtue of which said Demise the said *Job W.* afterwards, and after the Feast of Saint *Michael* one thousand seven hundred and fifty-six, according to the present Stile, (to wit) on the thirtieth Day of *September* in the Year last mentioned, according to the present Stile, entered into the said fifteen Acres of Land with the Appurtenances, and became and was possessed thereof, and continued so possessed thereof until and upon the thirtieth Day of *October* in the Year one thousand seven hundred and fifty-eight, according to the present Stile; and being so possessed thereof he the said *Job W.* afterwards, and before the said Time when, &c. (to wit) on the said thirtieth Day of *October* in the Year of our Lord one thousand seven hundred and fifty-eight, according to the present Stile, at *W.* aforesaid, demised the said fifteen Acres of Land with the Appurtenances to the said *Adam Lush*, to hold the same to him from the Feast of *All Saints*, according to the old Stile, then next ensuing, until the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile; by virtue of which said last-mentioned Demises the said *Adam Lush* afterwards, and before the said Time when, &c. (to wit) on the thirteenth Day of *November* in the Year of our Lord one thousand seven hundred and fifty-eight, entered into the said fifteen Acres of Land with the Appurtenances, and became and was possessed thereof; and being so possessed thereof he the said *Adam Lush* after the said Feast of *All Saints*, according to the Old Stile, in the Year last aforesaid, and before the said

said Time when, &c. (to wit) on the same Day and Year in the said Declaration mentioned, put the said eight Sheep, then being the commonable Sheep of the said *Adam Lush*, and levant and couchant in and upon the said fifteen Acres of Land with the Appurtenances, into the said Place in which, &c. to feed upon the Grass there growing, and to use his said Common of Pasture there, and the said eight Sheep were depasturing in the said Place in which, &c. on that Occasion, as they lawfully might, till the said *Thomas* and *George*, before the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the Old Stile, (to wit) at the said Time when, &c. of their own Wrong took the said eight Sheep in the said Place in which, &c. and unjustly detained the same against Gages and Pledges until, &c. in Manner and Form as the said *Adam Lush* hath above thereof complained against them; and this he is ready to verify: Wherefore in as much as the said *Thomas* and *George* have above acknowledged the taking of the said eight Sheep in the said Place in which, &c. the said *Adam Lush* prays Judgment, and his Damages by reason of the taking and unjust detaining of the same to be adjudged to him, &c. And for further Plea in Bar to the said Cognizance of the said *Thomas* and *George* by them lastly above made as to the taking of the said eight Sheep in the said Declaration mentioned, the said *Adam Lush*, by like Leave of the Court here to him for this Purpose granted, according to the Form of the Statute in such Case lately made and provided, says, That the said *Thomas* and *George*,

George, by reason of any thing therein alledged as Bailiffs of the said Mayor, Burgesſes and Commonalty, ought not to acknowledge the taking of the ſaid eight Sheep in the ſaid Place in which, &c. to be juſt, becauſe he ſays that true it is, that the ſaid Place called the *Old Moor* in which, &c. long before, and at the ſaid Time when, &c. was and ſtill is a certain large Waſte or Paſture called and known by the ſeveral Names of the *Old Moor*, otherwiſe *Portman's Moor*, otherwiſe *Portman's Mead*, containing by Eſtimation a large Number of Acres (to wit) forty Acres lying and being at *W.* aforeſaid in the County of *Berks* aforeſaid, as the ſaid *Thomas* and *George* have in their ſaid Cognizance above alledged; But the ſaid *Adam Luſh* further ſays, That long before, and at the ſaid Time when, &c. one *William F.* was, and ſtill is ſeiſed of and in a certain Meſſuage and diſverſe, (to wit) one hundred Acres of Land with the Appurtenances, ſituate, lying and being at *W.* aforeſaid, in his Demefne as of Fee, and that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid Meſſuage and Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and the ſaid *William F.* ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, &c. every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of

the *Purification of the Blessed Virgin Mary*, according to the same Stile then next following, to be had and taken with Sheep, as to the said Messuage and Land with the Appurtenances belonging and appertaining; and the said *William F.* being so seised of the said Messuage and Land with the Appurtenances, afterwards, and before the said Time when, &c. (to wit) on the twentieth Day of *September* in the Year of our Lord one thousand seven hundred and fifty-six, according to the present Stile, at *W.* afore said, demised the said Messuage and Land with the Appurtenances to one *Job W.* to hold the same to him from the Feast of Saint *Michael the Archangel* then next following, according to the present Stile, for one whole Year then next to come, and so from Year to Year for so long Time as it should please the said *William F.* and *Job W.* by virtue of which said Demise the said *Job W.* afterwards, and after the Feast of Saint *Michael the Archangel* in the Year of our Lord one thousand seven hundred and fifty-six, according to the present Stile, and before the said Time when, &c. (to wit) on the thirtieth Day of *September* in the year last afore said according to the present Stile, at *W.* afore said, entered into the said Messuage and Land with the Appurtenances, and became and was, and continually from thenceforth hitherto hath been, and still is possessed thereof; and being so possessed thereof he the said *Job W.* afterwards, and before the said Time when, &c. (to wit) on the twentieth Day of *December* in the Year of our Lord one thousand seven hundred and fifty-eight, according to the present Stile, at *W.* afore said,

gave Leave and Licence to the said *Adam Lush* to put the said eight Sheep into the said Place in which, &c. to feed upon the Grass there growing, by virtue of which said Licence the said *Adam Lush* afterwards, and after the Feast of *All Saints* in that Year, according to the Old Stile, and before the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile, and before the said Time when, &c. (to wit) on the said Day and year in the said Declaration mentioned, put the said eight Sheep into the said Place in which, &c. to feed upon the Grass there growing, and the said eight Sheep were depasturing in the said Place in which, &c. on that Occasion, as they lawfully might, till the said *Thomas* and *George* at the said Time when, &c. of their own Wrong took the said eight Sheep in the said Place in which, &c. and unjustly detained the same against Gages and Pledges until, &c. in Manner and Form as the said *Adam Lush* hath above thereof complained against them; and this he is ready to verify; Wherefore in as much as the said *Thomas* and *George* have above acknowledged the taking of the said eight Sheep in the said Place in which, &c. the said *Adam Lush* prays Judgment, and his Damages by reason of the taking and unjust detaining of the same to be adjudged to him, &c.

And the said *Thomas* and *George*, as to the Replication. said Plea of the said *Adam Lush* by him first above pleaded in Bar, as to the said Cognizance of the said *Thomas* and *George* by them first above made, as before, say, That the said Place called the *Old Moor* in which, &c. at

A P P E N D I X.

the said Time when, &c. was Parcel of the Manor of *W.* in the said Cognizance mentioned, as the said *Thomas* and *George* have in their said Cognizance above alledged; and of this they put themselves upon the Country, and the said *Adam Lush* doth the same, &c. And the said *Thomas* and *George* as to the said Plea of the said *Adam Lush* by him secondly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them first above made, say, That the said eight Sheep in the said Declaration mentioned were at the said Time when, &c. in the said Place called the *Old Moor* in which, &c. wrongfully feeding and depasturing on the Grass there then growing, and doing Damage there to the said Mayor, Burgessees and Commonalty aforesaid, as the said *Thomas* and *George* have above in their said Cognizance alledged; Without this, that the said *William F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and still of right ought to have for himself and themselves, his and their Farmers and Tenants, Occupiers of the said fifteen Acres of Land with the Appurtenances, Common of Pasture in and upon the said Place called the *Old Moor*, in which, &c. for all his and their commonable Sheep levant and couchant upon the said fifteen Acres of Land with the Appurtenances, every Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of*
the

the Blessed Virgin Mary then next following, according to the same Stile, as to the said fifteen Acres of Land with the Appurtenances belonging and appertaining, in Manner and Form as the said *Adam Lush* hath above in his said Plea in that Behalf alledged; and this the said *Thomas* and *George* are ready to verify; Wherefore they pray judgment, and a Return of the said eight Sheep, together with their Damages, &c. according to the Form of the Statute, &c. to be adjudged to them, &c. And the said *Thomas* and *George*, as to the said Plea of the said *Adam Lush* by him thirdly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them first above made, say, That the said eight Sheep in the said Declaration mentioned were at the said Time when, &c. in the said Place called the *Old Moor* in which, &c. wrongfully feeding and depasturing* on the Grass there then growing, and doing Damage there to the said Mayor, Burgeesses and Commonalty aforesaid, as the said *Thomas* and *George* have above in their said Cognizance alledged; Without this, that the said *William F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said Messuage and Land in that Plea mentioned with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and still of Right ought to have for himself and themselves, his and their Farmers and Tenants, of the said Messuage and Land with the Appurtenances, the sole and separate Pasture of the said Place in which, &c. every

A P P E N D I X.

Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of the Blessed Virgin Mary*, according to the same Stile, then next following, to be had and taken with Sheep, as to the said Messuage and Land with the Appurtenances belonging and appertaining, in Manner and Form as the said *Adam Lush* hath above in his said Plea in that Behalf alledged; and this the said *Thomas* and *George* are ready to verify; Wherefore they pray Judgment, and a Return of the said eight Sheep, together with their Damages, &c. according to the Form of the Statute, &c. to be adjudged to them, &c. And the said *Thomas* and *George*, as to the said Plea of the said *Adam Lush* by him first above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them secondly above made, say, That the said Mayor, Burgesses and Commonalty of the said Borough of *W.* aforesaid, at the said Time when, &c. were seised in their Demesne as of Fee of and in the said Waste, or Common Pasture, called the *Old Moor* in which, &c. in Manner and Form as the said *Thomas* and *George* have above in their said Cognizance alledged; and of this they put themselves upon the Country, &c. and the said *Adam Lush* doth the same likewise. And the said *Thomas* and *George*, as to the said Plea of the said *Adam Lush* by him secondly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them above secondly made, say, That the said eight Sheep were at the said Time when, &c. in the said Place called the *Old Moor* in which, &c. wrongfully feeding and depasturing on the
 Grass

Grafs there then growing, and doing Damage there to the said Mayor, Burgesſes and Commonalty aforeſaid, as the ſaid *Thomas* and *George* have above in their ſaid Cognizance in that Behalf alledged; Without this, that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants, Occupiers of the ſaid fifteen Acres of Land with the Appurtenances, Common of Paſture in and upon the ſaid Place called the *Old Moor* in which, &c. for all his and their commonable Sheep levant and couchant upon the ſaid fifteen Acres of Land with the Appurtenances, every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary* then next following, according to the ſame Stile, as to the ſaid fifteen Acres of Land with the Appurtenances belonging and appertaining, as the ſaid *Adam Luſh* hath above in his ſaid Plea in that Behalf alledged; and this they the ſaid *Thomas* and *George* are ready to verify: Wherefore they pray Judgment, and a Return of the ſaid Sheep, together with their Damages, &c. according to the Form of the Statute, &c. to be adjudged to them, &c. And the ſaid *Thomas* and *George*, as to the ſaid Plea of the ſaid *Adam Luſh* by him thirdly above pleaded in Bar to the ſaid Cognizance of the ſaid *Thomas* and *George* by them

secondly above made, say, That the said Sheep in the said Declaration mentioned were at the said Time when, &c. in the said Place called the *Old Moor* in which, &c. wrongfully feeding and depasturing on the Grass there then growing, and doing Damage there to the said Mayor, Burgeſſes and Commonalty aforeſaid, as the said *Thomas* and *George* have above in their ſaid Cognizance alledged; Without this, that the ſaid *William F.* and all thoſe whoſe Eſtate he now hath, and at the ſaid Time when, &c. had of and in the ſaid Meſſuage and Land with the Appurtenances in that Plea mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have uſed and been accuſtomed to have, and ſtill of Right ought to have for himſelf and themſelves, his and their Farmers and Tenants of the ſaid Meſſuage and Land with the Appurtenances, the ſole and ſeparate Paſture of the ſaid Place in which, &c. every Year from the Feaſt of *All Saints*, according to the Old Stile, until the Feaſt of the *Purification of the Bleſſed Virgin Mary*, according to the ſame Stile, then next following, to be had and taken with Sheep, as to the ſaid Meſſuage and Land with the Appurtenances belonging and appertaining, the ſaid *Adam Luſh* hath above in his ſaid Plea alledged; and this they the ſaid *Thomas* and *George* are ready to verify; Wherefore they pray Judgment, and a Return of the ſaid Sheep, together with their Damages, &c. according to the Form of the Statute, &c. to be adjudged to them, &c.

Rejoinder.

And the ſaid *Adam Luſh*, as to the ſaid Plea of the ſaid *Thomas* and *George* above in Reply pleaded

pleaded to the said Plea of him the said *Adam Lush* secondly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them first above made as before, saith, That the said *William F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and the said *William F.* still of Right ought to have for himself and themselves, his and their Farmers and Tenants, Occupiers of the said fifteen Acres of Land with the Appurtenances, Common of Pasture in and upon the said Place called the *Old Moor* in which, &c. for all his and their commonable Sheep levant and couchant upon the said fifteen Acres of Land with the Appurtenances, every Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile, as to the said fifteen Acres of Land with the Appurtenances belonging and appertaining, in Manner and Form as the said *Adam Lush* hath above in his said Plea in that Behalf alledged; and this the said *Adam Lush* prays may be enquired of by the Country, and the said *Thomas* and *George* do the same likewise. And as to the said Plea of the said *Thomas* and *George* by them in Reply pleaded to the said Plea of him the said *Adam Lush* thirdly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them first above made, the said *Adam Lush* as before, saith, That the said *William F.* and

all

all those whose Estate he now hath, and at the said Time when, &c. had of and in the said Messuage and Land in that Plea in Bar mentioned, with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and the said *William F.* still of Right ought to have for himself and themselves, his and their Farmers and Tenants of the said Messuage and Land with the Appurtenances, the sole and separate Pasture of the said Place in which, &c. every Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of the Blessed Virgin Mary*, according to the same Stile; then next following, to be had and taken with Sheep, as to the said Messuage and Land with the Appurtenances belonging and appertaining, in Manner and Form as the said *Adam Lush* hath above in his said Plea in that Behalf alledged; and this the said *Adam Lush* also prays may be enquired of by the Country, and the said *Thomas* and *George* do the same likewise. And as to the said Plea of the said *Thomas* and *George* above in Reply pleaded to the said Plea of him the said *Adam Lush* secondly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them secondly above made, as before, saith, That the said *William F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said fifteen Acres of Land with the Appurtenances, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and the said *William F.* still of Right ought

ought to have for himself and themselves, his and their Farmers and Tenants, Occupiers of the said fifteen Acres of Land with the Appurtenances, Common of Pasture in and upon the said Place called the *Old Moor* in which, &c. for all his and their commonable Sheep levant and couchant upon the said fifteen Acres of Land with the Appurtenances, every Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of the Blessed Virgin Mary* then next following, according to the same Stile, as to the said fifteen Acres of Land with the Appurtenances belonging and appertaining, as the said *Adam Lush* hath above in his said Plea in that Behalf alledged; and this the said *Adam Lush* also prays may be enquired of by the Country, and the said *Thomas* and *George* do the same likewise. And as to the said Plea of the said *Thomas* and *George* above in Reply pleaded to the said Plea of the said *Adam Lush* thirdly above pleaded in Bar to the said Cognizance of the said *Thomas* and *George* by them secondly above made as before, saith, That the said *William F.* and all those whose Estate he now hath, and at the said Time when, &c. had of and in the said Messuage and Land with the Appurtenances in that Plea in Bar mentioned, from Time whereof the Memory of Man is not to the contrary, have had, and have used and been accustomed to have, and the said *William F.* still of right ought to have for himself and themselves, his and their Farmers and Tenants of the said Messuage and Land with the Appurtenances, the sole and separate Pasture of the said Place in which, &c.

Et. every Year from the Feast of *All Saints*, according to the Old Stile, until the Feast of the *Purification of the Blessed V rgin Mary*, according to the same Stile then next following, to be had and taken with Sheep as to the said Messuage and Land with the Appurtenances belonging and appertaining, as the said *Adam Lush* hath above in his said Plea alledged; and this the said *Adam Lush* also prays may be enquired of by the Country, and the said *Thomas* and *George* do the same likewise. Therefore as well to try this Issue as the said several other Issues above joined between the Parties, the Sheriff is commanded that he cause to come here in eight Days of the *Purification of the Blessed Virgin Mary*, twelve, Et. by whom, Et. who neither, Et. to recognize, Et. because as well, Et.

F I N I S.